What's Next for Wayne Dick? The Next Phase of the Debate over College Hate Speech Codes*

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Our nation's colleges and universities have traditionally been a haven for the free interchange of ideas. In recent years our nation's campuses have experienced a tremendous increase in the number of verbal, physical, and political attacks on members of minority groups. In an attempt to curb the rise of hate on campus, administrators have begun passing hate speech codes, which punish members of the university community who promote hate. The enactment of campus speech regulations implicates the First Amendment and has sparked serious debate over the wisdom and constitutionality of such regulations. Regardless of the reason a university decides to adopt a speech code, it must develop a code that can withstand constitutional scrutiny because these regulations implicate the First Amendment.

This note begins with the story of Wayne Dick, a Yale University sophomore, who was punished by the school for expressing his opinion on Gay and Lesbian Awareness Days. Needless to say, many at Yale did not believe Dick's opinion should be expressed on campus. Wayne Dick's story provides a good overview of the issues raised by both sides of the campus hate speech code debate. Next, the note examines early constitutional justifications for campus speech regulations and how the federal court system rejected these justifications. Finally, the author proposes a possible constitutionally acceptable framework for limiting speech on college campuses and analyzes Wayne Dick's situation under this proposed framework.

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** I would like to dedicate this note to my grandfather, Irving William Silversten, a man who has taught me that every day is a new opportunity to live, learn, and grow. I would like to thank my colleague and friend, Eric Bono, for his tremendous help in preparing this article for publication.

> *I have always been among those who believed that the greatest freedom of speech was the greatest safety, because if a man is a fool, the best thing to do is to encourage him to advertise the fact by speaking. It cannot be so easily discovered if you allow him to remain silent and look wise, but if you let him speak, the secret is out and the world knows that he is a fool. So it is by the exposure of folly that it is defeated; not by the seclusion of folly . . . .*
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> – Woodrow Wilson[1]

I. INTRODUCTION: MEET WAYNE DICK

In April of 1986, Yale University hosted its fifth annual Gay and Lesbian Awareness Days (GLAD) to increase the school community's awareness of the campus' gay and lesbian population.[2] Posters advertising GLAD's various events were posted around campus.[3] The week following GLAD, anonymous posters appeared around campus as a parody of GLAD.[4] The posters advertised the fictitious BAD—Bestiality Awareness Days—and its fictional schedule of activities.[5] Although nothing in the posters was obscene under the legal definition, nor did the text defame any specific individual, several members of the Yale community were offended and began searching for the creator of the anonymous posters.[6] By questioning employees at local copy shops, it was discovered that Wayne Dick, a sophomore from Florida, had copied the posters.[7]

Once the culprit's identity was known, Caroline Jackson, director of the Afro-American Cultural Center, and Patrick Santana, a Yale senior, filed a complaint with Patricia Pierce, associate dean and secretary of the Yale College

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[1] Woodrow Wilson, Speech in the Institute of France in Paris (May 10, 1919) *quoted in* RESPECTFULLY QUOTED 134 (Suzy Platt ed., 1993). Many people know Woodrow Wilson as the twenty-eighth President of the United States, but before he was elected President, he was Governor of New Jersey, and before he was elected Governor, he was a scholar and an educator. *See generally* AUGUST HECKSCHER, WOODROW WILSON BIOGRAPHY (1991). In 1902, Wilson was named president of Princeton University. *See id.* In his inaugural address, Wilson expressed the view that it was not the role of a university to prepare its students for a good job, rather its purpose was to make them useful to society. JAN WILLEM SCHULTE NORDHOLT, WOODROW WILSON: A LIFE FOR WORLD PEACE 55 (Herbert H. Rowen trans., 1991).

[2] NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE 118 (1992).

[3] TIMOTHY C. SHIELL, CAMPUS HATE SPEECH ON TRIAL 50 (1998).

[4] *Id.*

[5] Some of the events advertised on the BAD posters were: "'"PAN: the Goat, the God, the Lover," a lecture by Professor Baaswell'; 'Bishop Bleatmore . . . speaking on the IMPACT OF HOMO ERECTUS ON THE ORIGIN OF NEW SPECIES, Blight Hall'; "'Lambda Lambda Lambda—Yale's own Animal House!! announces their first BARNYARD RUSH—Y'all Come!!! all night at the Rockinghorse Club.'" HENTOFF, *supra* note 2, at 119.

[6] *See id.* at 119.

[7] *Id.* at 119–20.

Executive Committee charging Wayne Dick[8] with violating the university's code of conduct.[9] Specifically, Dick was charged with illegal harassment, which banned "any act of harassment, intimidation, coercion or assault, or any other act of violence against any member of the community, including sexual, racial or ethnic harassment."[10] On May 2, 1986, Dick received a letter from the Yale College Executive Committee informing him of the complaint and that two members of the committee found sufficient grounds to warrant a hearing before the full Executive Committee.[11] Dick was required to prepare a written statement for the hearing.[12]

Wayne Dick developed his defense around provisions contained in the same regulations that were used by Jackson and Santana to bring the initial charges. In 1975, C. Vann Woodward, a renowned professor of history at Yale, chaired a committee that prepared a report, which was used to set the standard for freedom of expression at Yale.[13] The report, known as the Woodward Report, became part of the undergraduate regulations, which were used to charge Dick with illegal harassment.[14] Dick's defense focused on the following passage from the Woodward Report:

> If a university is a place for knowledge, it is also a special kind of small society. Yet it is not primarily a fellowship, a club, a circle of friends, a replica of the civil society outside it. Without sacrificing its central purpose [to discover and disseminate knowledge], it cannot make its primary and dominant value the fostering of friendship, solidarity, harmony, civility or mutual respect.... It may sometimes be necessary in a university for civility and mutual respect to be superseded by the need to guarantee free expression....

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[8] Wayne Dick was a sophomore from a rural area of Florida. *See* SHIELL, *supra* note 3, at 52. His father worked for a construction company and his mother was a secretary. Neither of Wayne's parents graduated from college, and so Wayne was the first member of his family with an opportunity to graduate from college. After Yale, Wayne planned on going to law school. *Id.* at 120.

[9] *See* SHIELL, *supra* note 3, at 50–51 (quoting the university's code of conduct).

[10] *Id.* at 51.

[11] *See* HENTOFF, *supra* note 2, at 121. The letter also contained information pertaining to the procedures for the upcoming hearing. The hearing would be closed and Dick was allowed one faculty advisor, who was not permitted to participate directly in the hearing. There would be no recorded vote, no explanation of the verdict, and the decision of the committee would be final. SHIELL, *supra* note 3, at 51. The Executive Committee was composed of both faculty and students. HENTOFF, *supra* note 2, at 121.

[12] *Id.*

[13] HENTOFF, *supra* note 2, at 114.

[14] *Id.* at 122.

> Even when some members of the university community fail to meet their social and ethical responsibilities, the paramount obligation of the university is to protect that right to free expression.[15]

Dick wrote in his statement to the Executive Committee that, no matter how distasteful the committee found the poster, "it [was] still protected" by the Woodward Report.[16] Dick concluded by writing: "'Only by ruling that the

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[15] The Report of the Committee on Free Expression at Yale [hereinafter Woodward Report], *in* Yale University Undergraduate Regulations, *quoted in* HENTOFF, *supra* note 2, at 122; *see also* ALEXANDER MEIKLEJOHN, TEACHER OF FREEDOM 256 (1981).

> The primary social fact which blocks and hinders the success of our experiment in self-government is that our citizens are not educated for self-government. We are terrified by ideas, rather than challenged and stimulated by them. Our dominant mood is not the courage of people who dare to think. It is the timidity of those who fear and hate whenever conventions are questioned.

Id. An exchange between the two main antagonists in Jerome Lawrence and Robert E. Lee's play *Inherit the Wind* I think nicely demonstrates society's need for people who challenge the status quo. The play, based on the trial that took place in Dayton, Kentucky in the 1920s, retells the story of a school teacher who was prosecuted for teaching Darwinism in the local high school in violation of state law. The exchange occurs as follows:

> DRUMMOND. Listen to this: Genesis 4–16. "And Cain went out from the presence of the Lord, and dwelt in the land of Nod, on the East of Eden. And Cain *knew his wife!*" Where the hell did *she* come from?
> BRADY. Who?
> DRUMMOND. Mrs. Cain. Cain's wife. If, "In the beginning" there were only Adam and Eve, and Cain and Abel, where'd this extra woman spring from? Ever figure that out?
> BRADY. *(Cool.)* No, sir. I will leave the agnostics to hunt for her. *(Laughter from spectators.)*
> DRUMMOND. Never bothered you?
> BRADY. Never bothered me.
> DRUMMOND. Never tried to find out?
> BRADY. No.
> DRUMMOND. Figure somebody pulled off another creation over in the next county?
> BRADY. The Bible satisfies me, it is enough.
> DRUMMOND. It frightens me to imagine the state of learning in this world if everyone had your driving curiosity. . . .

JEROME LAWRENCE AND ROBERT E. LEE, INHERIT THE WIND 53 (1986). Summing up the play, the authors wrote: "INHERIT THE WIND is not about the theory of evolution versus the literal interpretation of the Bible. It assaults those who would constrict any human being's right to think, to teach, to learn. Our major theme is 'the dignity of the human mind.'" *Id.* at 83.

[16] HENTOFF, *supra* note 2, at 123. It is important to note that Yale University is a private institution and is not subject to the same constitutional barriers as its public counterparts. Private schools are able to pass rules that would be deemed unconstitutional if the same rule were passed at a state school. *See* Evan G.S. Siegel, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities,* 39 EMORY L.J. 1351, 1378–81 (1990) (stating that most courts have held that private universities are not state actors, thus they are immune from the limitations imposed by the First and Fourteenth Amendments). *But see* Mark Tushnet, *Public and Private Education: Is There a Constitutional Difference?,* 1991

exercise of free speech is not harassment and finding that I am innocent will the Executive Committee have justly interpreted its own rules and reaffirmed Yale's commitment to free expression.'"[17]

Unfortunately for Wayne Dick, the Executive Committee chose not to reaffirm the school's commitment to free expression. On May 13, the day after Dick's two and one-half-hour hearing, the committee determined that Dick had violated the harassment regulations. As a result, Dick was placed on two years

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U. CHI. LEGAL F. 43 (1991) (arguing that there is not a significant constitutional difference between public and private schools). *See also* State v. Schmid, 84 N.J. 535, 567–69 (1980) (holding that "in the absence of a reasonable regulatory scheme, Princeton University [a private institution] did in fact violate defendant's State constitutional rights of expression").

In the Early 1990s, Henry Hyde, a representative from Illinois, introduced a bill that would have applied the requirements of the First Amendment to private colleges and universities. The bill died in the House of Representatives. *See* HATE SPEECH ON CAMPUS 129 n.3 (Milton Heuman and Thomas W. Church eds., 1997).

Thus, Wayne Dick was unable to rely upon the First Amendment directly for help, but was forced to build his defense around the Woodward Report, which happened to incorporate principles derived from the First Amendment, into Yale's Disciplinary Code.

Although this note focuses on hate speech codes on public college campuses, I have chosen to begin with the story of Wayne Dick because in my view, his speech is clearly protected by the First Amendment. *See generally* Cohen v. California, 403 U.S. 15 (1971) (overturning the conviction of a man who wore a jacket bearing the words "Fuck the Draft" because the Court stated the government may not punish speech it finds offensive simply because it finds the speech offensive); Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92 (1972) (striking a city ordinance because the government may not select which issues are worth discussing in public areas); Niemotko v. Maryland, 340 U.S. 268 (1951) (striking a permit requirement for conducting religious activities in a public park when some groups were granted permits and other similarly situated groups were not). The question becomes what makes a state college campus different from a public park or street corner? For a good discussion of the differences between various areas of the college campus, see generally James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech,* 38 WAYNE L. REV. 163 (1991) (describing different areas of a college campus and stating what level of First Amendment protection the author believes each area deserves).

Even on the campuses of our nation's private universities, where the institution is not held to the strictest constitutional standard, the tenets of the First Amendment are deeply ingrained into the concept of what it means to be an academic community. *See supra* text accompanying note 15; *see also* WAKE FOREST UNIVERSITY, WAKE FOREST STUDENT HANDBOOK 9 (1997) [hereinafter WAKE FOREST STUDENT HANDBOOK] (stating that the university subscribes to principles that "promote[] a democratic spirit arising from open-mindedness and discourse") (on file with author). There would seem to be serious tension, and perhaps a great deal of hypocrisy, when a university declares in its "statement of principles" that it is devoted to the principles of the First Amendment yet punishes someone like Wayne Dick for nothing more than exercising the rights granted him in the school's handbook. *See* Siegel, *supra,* at 1388 ("A private college or university which imposes upon its community a code that would not pass constitutional muster at a public school risks being seen as disingenuous at best, and perhaps even intellectually dishonest.").

[17] HENTOFF, *supra* note 2, at 123.

probation.[18] Unwilling to simply accept his punishment, and in need of some clarification on what was acceptable speech at Yale,[19] Wayne Dick wrote an

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[18] SHIELL, *supra* note 3, at 51–52. At Yale, probation meant that the verdict would be part of Dick's permanent record. If at any time during the next two years Dick committed a second offense, he would be suspended or expelled. *See* HENTOFF, *supra* note 2, at 124.

It is interesting to note how times change. In 1976, Texas A&M University refused to recognize a student organization called the Gay Student Services (GSS). Gay Student Servs. v. Tex. A&M Univ., 737 F.2d 1317, 1320 (5th Cir. 1984). The school refused recognition because it perceived the group's goals to be inconsistent with those of the university. *Id.* GSS's stated goals were the following:

1) To provide a referral service for students desiring professional counseling including psychological, religious, medical, and legal fields.
2) To provide to the TAMU community information concerning the structures and realities of gay life.
3) To provide speakers to classes and organization who wish to know more about gay lifestyles.
4) To provide a forum for the interchange of ideas and constructive solutions to gay people's problems.

Id. The purported goals of the GSS were quite similar to the goals of Yale's GLAD in 1986. *See supra* note 2 and accompanying text. Apparently at Texas A&M in 1976, Wayne Dick's parody of GLAD's advertisements would have faced no disciplinary sanctions because the university agreed with his viewpoint. Unfortunately for Dick, his poster appeared at Yale ten years later where his viewpoint did not meet with approval.

[19] A clarification of what could and could not be expressed at Yale was very important to Dick's future because a violation of his probation would result in a suspension or expulsion from the school. For all intents and purposes, Dick's conviction permanently chilled his expression because his speaking out on a controversial issue again could result in suspension. With one strike already against him, Dick could hardly afford to be too expressive on any other controversial matters. If the government or a school administration has the power to punish speech then the chance of speech being chilled increases, and preventing the government from chilling speech is one of the main purposes of the First Amendment. *See* Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) ("[I]t bears repeating . . . that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."); *see also* Terminiello v. City of Chicago, 337 U.S. 1, 4–5 (1949) (stating that vigilant First Amendment enforcement protects against the "standardization of ideas either by legislatures, courts, or dominant political or community groups").

The enforcement of a speech code by a university leads to an environment in which students and faculty are afraid to discuss controversial issues. For example, after Douglas Hann was expelled from Brown University, *see infra* note 30, a cloud of orthodoxy seemed to descend upon the campus, as the following incidents demonstrate:

- Public speakers, both from within and without the university have had trouble completing speeches because of hecklers' protests. During the semester in which Hann was expelled, an El Salvadoran official received the "heckler's veto" at a lecture. Meetings concerning the reform of the university's sexual assault policy were disrupted and brought to a close by BASH (Brown Against Sexual Assault and Harassment) who opposed the university's perceived lax attitude toward date rape. Upon failing to prevent a lecture by the controversial writer P.J. O'Rourke,

appeal letter to Yale president, A. Bartlett Giamatti.[20] The university's president responded to Dick's appeal by stating that Dick had the right to express his opinion on any topic, but nonetheless, the committee's decision would stand.[21]

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demonstrators packed the audience and disrupted the lecture by an angry mass exodus during the speech.

- Political Science Chair Nancy Rosenblum had to cajole her "Justice and Gender" class to start any discussion regarding Affirmative Action, despite her assertion that she was sure that there was an enormous range of opinions on the policy.
- Two weeks after President Gregorian addressed the assembled students on the green regarding the racist and homophobic graffiti incident, a Brown professor canceled the screening of "Birth of a Nation," after receiving criticism about the film's racist content.
- The Commencement issue of the *Brown Daily Herald* reported, "A professor of one of the editors of this [issue], in a small, informal discussion with five people following a section, confided that in class he had avoided discussing some research he had come across and some unpopular conclusions he had come to about a controversial topic—the problem of inner-city poverty. "It is a sensitive topic," he said, "and I don't want to get into it in front of a class of 150 Brown students."

HATE SPEECH ON CAMPUS, *supra* note 16, at 162–63.

[20] In his letter to Yale President Giamatti, Dick wrote:

> I have been told that my poster is not protected . . . because it is worthless and offensive. I have seen many posters that I thought were worthless and offensive, but I respect others' rights to express their views. . . . I was born and raised in a small town in Florida where the old southern political philosophy and prejudices were commonly accepted. By and large, I accepted these views without really considering them. When I came to Yale as a freshman, I found that my views were held by a small minority and I soon had to justify them for the first time . . . . In defending my beliefs through conversation with various people, I realized that some of my views were ill-considered. For those I have kept, I now, at least, have a philosophical basis for them. Of course, I can hardly claim to be all-wise after having just completed my sophomore year but because of the free interchanging of ideas, I have grown . . . . To avoid heated arguments and to avoid hard feelings, I have often kept silent, even when I had strong moral objections to a point of view that was being stated. Recently, though, I decided to criticize an event which was, until recently, considered morally repugnant. My main reason for deciding to state my opinion more publicly was that only one opinion on this issue was being heard . . . . I ask that my sentence be overturned if the free expression regulation is in force or that my sentence be reduced because of my ignorance of the special status of the debate on homosexuality . . . . If my sentence is not overturned, please advise me as to other views that I am also not allowed to criticize, so that I won't unknowingly violate my probation and the standards of Yale University.

SHIELL, *supra* note 3, at 52.

[21] SHIELL, *supra* note 3, at 53. In the letter, Giamatti assured Dick that he had the right to freedom of expression "on any issue" and that the university would protect that right "in the future as it has in the past." *Id.* The hypocrisy of Giamatti's statement is self-evident. *See* Siegel, *supra* note 16, at 1390 ("A private university that . . . maintain[s] a restrictive speech policy must face the chance that it will become known as hostile to free expression of thought."). Clearly, students at Yale at this time did not have the right to express their opinions on any issue. Otherwise Wayne Dick would not have been punished for expressing his opinion. Unless of course, any issue means any issue except homosexuality. This begs the question: Is there any other exception to the general "any issue" rule under which Yale will decide to punish students

Wayne Dick's situation looked rather bleak when Nat Hentoff, a free speech journalist, heard about it and decided to get involved. At first, Hentoff ran into a brick wall in the form of the Yale administration, but finally he talked with Guido Calabresi, Dean of the Yale School of Law, who was familiar with the story and felt the situation was "outrageous!"[22] After garnering the support of Dean Calabresi, Hentoff contacted C. Vann Woodward, the Chairperson of the committee that authored the Woodward Report and who remained a professor at Yale.[23] Professor Woodward informed the journalist that the Executive Committee misused the report.[24] Hentoff and Woodward began rallying the national media around Wayne Dick, and articles critical of the Executive Committee's decision appeared in *The New York Times, The Village Voice,* and *The Washington Post.*[25]

During this period, Giamatti left Yale to become president of Major League Baseball's National League and was replaced by Benno Schmidt.[26] President Schmidt, in his inaugural address, announced his stand on the topic of free expression when he stated: "There is no speech so horrendous in content that it does not in principle serve our purposes."[27] President Schmidt then encouraged Wayne Dick to ask the Executive Committee for a new hearing, which Dick decided to do.[28] In a press release, the Executive Committee announced that it had voted to reverse its earlier decision to discipline Wayne Dick, adding that the

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post facto? This was a very important issue to Wayne Dick who was already on probation because another violation could have meant expulsion. *See supra* note 18 and accompanying text.

22 HENTOFF, *supra* note 2, at 127. Calabresi, now a federal circuit court judge, continued: "It would have been perfectly appropriate for the faculty and the administrators to say that the flyer was disgraceful and disgusting and that he should be ashamed of himself. But what he did was not in any way punishable . . . ." *Id.*

23 *See id.* at 128.

24 *Id.* Woodward also stated, "The Woodward Report does not guarantee that the speech has to be acceptable or pleasant or even correct. It simply guarantees the right to all to exercise their speech. Mr. Dick, it seems to me, was doing just that." *Id.* at 128–29.

25 *See id.* at 129–30 (discussing the various news reports and editorials that were published in the national media). One major problem with regulating offensive speech is that people take up the speaker's cause—not because they agree with the message, but because they believe in his right to say it. Instead of a few fliers being posted around New Haven, Connecticut, for a few days, Wayne Dick's exploits received national attention. Dick was given a microphone and pulpit to spread his opinions across the entire country. *See* JAMES WEINSTEIN, HATE SPEECH, PORNOGRAPHY, AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE 150–53 (1999) (suggesting that experience both at home and abroad demonstrates that prosecutions of racist speech allows the racist speech to be more widely disseminated than it would have been without the prosecution).

26 *See* SHIELL, *supra* note 3, at 53.

27 HENTOFF, *supra* note 2, at 129.

28 *Id.*

decision to overturn Dick's conviction had nothing to do with the negative publicity the committee had received from the national media.[29]

Expressions similar to those made by Wayne Dick can be found on almost any college campus in the country,[30] and codes similar to Yale's, known generically as "campus hate speech codes," can be found on an increasing number of campuses as well.[31] The moral, ethical, and constitutional validity of these codes has been hotly debated, generating numerous battles over the constitutionality of campus speech codes in our nation's courts.[32]

Whether it is a wise practice to institute hate speech codes becomes a moot point if the drafters of such codes are unable to create a code that is deemed constitutional. This note will briefly evaluate the merits of these codes; however, the focus will be on why these provisions have failed in the past and what factors drafters should consider in the future.

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[29] *Id.* at 129–30.

[30] *See, e.g.,* SHIELL, *supra* note 3, at 17 (listing various examples of hateful speech on college campuses); Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus,* 1990 DUKE L.J. 431, 431–33 (1990) (beginning his article with a "Newsreel" of racist incidents on college campuses around the country). In November of 1990, Douglas A. Hann, a junior at Brown University in Providence, R.I., was expelled from the school primarily for making racist, sexist, homophobic, and anti-Semitic statements. *See* HATE SPEECH ON CAMPUS, *supra* note 16, at 149–69. There are a number of similarities between Douglas Hann's situation at Brown and the Wayne Dick odyssey four years earlier at Yale.

[31] *See, e.g.,* Jeanne M. Craddock, *Constitutional Law—"Words that Injure; Laws that Silence:" Campus Hate Speech Codes and the Threat to American Education,* 22 FLA. ST. U. L. REV. 1047, 1051–55 (discussing the rise of hate speech codes on college campuses and differentiating between explicit and implicit codes—both of which limit expression on campus). *See* SHIELL, *supra* note 3, at 49 (stating that twenty-eight percent of American universities "ban advocacy of offensive or outrageous viewpoint[s]"); *see also* Kenneth Lasson, *Controversial Speakers on Campus: Liberties, Limitations and Common Sense Guidelines,* 12 ST. THOMAS L. REV. 39, 75 n.177 (1999) (noting that one observer has determined that approximately seven hundred colleges and universities had enacted speech codes by 1995).

Explicit speech codes are simply those regulations that do not even attempt to hide their purpose. The code was adopted for one purpose—to punish speech the university finds offensive. *See infra* notes 84–87 and accompanying text (describing the University of Michigan's explicit speech code). In contrast, implicit speech codes are hidden within a university's code of conduct and can be pulled out by a college administrator at any time to punish speech found to be offensive. *See, e.g.,* WAKE FOREST STUDENT HANDBOOK, *supra* note 16, at 48 ("18. Any unauthorized activity on University property which affects the University's pursuit of its mission is prohibited.") (on file with author). Implicit speech codes may be more dangerous than explicit codes because at least explicit codes provide the student with some forewarning of what conduct is punishable. After all, what actually constitutes unauthorized activity?

[32] *Compare* HENTOFF, *supra* note 2 (opposing vehemently the adoption of speech codes) *with* CATHARINE A. MACKINNON, ONLY WORDS (1993) (putting forth the proposition that hateful speech is hurtful and should be punished).

Part II of this note will address what I call Phase I of the hate speech code debate. Phase I discusses the original justification for campus speech codes, focusing primarily on the constitutional justifications offered by proponents of such codes. Part II also examines the various court cases analyzing campus speech regulations. For the most part, courts refused to accept the proponents' constitutional justifications for the college speech codes, and instead struck down the codes as violating the First Amendment. Before Phase I came to an end the Supreme Court joined the debate, making it even more difficult to design a speech code that would withstand constitutional scrutiny.

Part III of this note proposes a potentially constitutional speech code. This regulation is based on elements taken from the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*[33] and Title VII's workplace harassment guidelines.[34] One of the major problems courts had with campus hate speech codes in Phase I was that the proponents of the codes would stretch their justifications for the codes too far, so that the code would limit more speech than was actually justified. The *Tinker*-Title VII theory attempts to take only what is needed from each prong to justify a speech code. The *Tinker*-Title VII theory provides proponents of speech codes with a constitutionally accepted justification and framework for limiting hateful speech on college campuses. Part III concludes by bringing Wayne Dick back into the picture and revisiting his situation under the *Tinker*-Title VII theory.

II. PHASE I OF THE HATE SPEECH CODE DEBATE

During the 1960s, college campuses were a hotbed for violent demonstrations including protests concerning the Vietnam Conflict and the denial of civil rights to millions of African-Americans.[35] Growing out of the aftermath of the McCarthy paranoia, there was a serious commitment to protecting free expression at the nation's universities.[36] In the 1980s, there was a "rise in the number of

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[33] 393 U.S. 503 (1969).

[34] *See infra* note 255 and accompanying text.

[35] *See* Richard A. Glenn & Otis H. Stephens, *Campus Hate Speech and Equal Protection: Competing Constitutional Values*, 6 WIDENER J. PUB. L. 349, 354 (1997).

[36] In a series of cases stretching from the 1950s to the 1970s, the Supreme Court expressed the importance of free expression in higher education. In a 1957 case the Court upheld a professor's right to express politically unpopular opinions when it stated, "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion). In *Shelton v. Tucker*, 364 U.S. 479, 487 (1960), the Court declared, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." This idea was reaffirmed by the Court when the State University of New York at Buffalo attempted to condition professors' employment on their denial of affiliation with the Communist Party. *See* Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 591–92, 603 (1967) (stating that academic freedom is

verbal, physical and political attacks on members of minority groups in the United States."[37] In response to this rise in hate crimes, many universities passed hate speech codes in order to "achieve [an] equality for traditionally subordinated groups in the marketplace of ideas."[38] The passage of speech codes on college campuses also paralleled the international community's response to the rise of hate crimes around the world.[39] Thus, although there has been a strong commitment to academic freedom at American universities,[40] many college administrations have implicitly placed the right to equality above the right to free expression by passing speech codes to protect minority students from hateful speech.[41]

"a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom"). A few years later the Court held that the need to maintain order on a college campus does not mean that "First Amendment protections should apply with less force . . . than in the community at large." Healy v. James, 408 U.S. 169, 180 (1972). Finally, the Court stated that a university could not limit speech simply because of the offensive nature of the speech. Papish v. Bd. of Curators, 410 U.S. 667, 670 (1973) (per curiam) ("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'").

37 Craddock, *supra* note 31, at 1050. *See also* Glenn & Stephens, *supra* note 35, at 352–53 (highlighting the patterns of hate crimes in the United States in the 1990s); H.R. REP. NO. 103-244, at 3 (1993) (citing studies that show reported incidents of hate crimes in the early 1990s reached an all time high).

38 Craddock, *supra* note 31, at 1048.

39 "[T]he United States stands virtually alone in thinking that hate speech ought to be legal." SHIELL, *supra* note 3, at 32. Most members of the international community have adopted article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 4, 660 U.N.T.S. 195, 212. In addition, many countries have adopted their own speech regulations, which place the right to equality over the right to free expression. *Id.* However, other scholars point out that there is no evidence from these countries that their censorship has had an effect on racist attitudes. Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 554 (1990). Additionally, no persuasive psychological evidence exists that shows punishment of hateful speech helps to change individuals' attitudes. *Id.*

40 *See supra* note 36 and accompanying text.

41 *See* Patricia Hodulik, *Racist Speech on Campus*, 37 WAYNE L. REV. 1433, 1433 (1991) ("The increasing frequency of racist speech and other forms of discriminatory conduct on college campuses has led many colleges and universities to adopt or to consider adopting student conduct rules prohibiting such behavior.").

College administrators do not appear to be the only Americans prepared to limit First Amendment protections. A recent survey turned up some remarkable results, including the following: 67% of respondents said that public remarks offensive to racial groups should not be allowed, 36% of respondents would support a ban on racist speech, and 31% of respondents said a group should not be allowed to protest if others in the community are offended by the protestors' cause. Ken Paulson, *Answers suggest we are a nation that loses sight of fundamental freedoms*, THE NEWS-HERALD, July 2, 2000, at B1 & B6 (on file with author).

A. *Hate Speech Codes Justified*

Commentators have proposed several justifications for the passage of hate speech regulations. One of the most commonly proposed justifications is that hate speech inflicts psychological, physical, and pecuniary harm on individual victims.[42] Moreover, proponents of speech codes argue that regulating speech not only protects minorities from this harm, but also exemplifies a university's disapproval of hateful speech and its commitment to tolerance and diversity.[43] Proponents of speech codes also focus on the fact that the First Amendment is a tool for discovering the truth, and therefore, speech that does not contribute to the discovery of the truth does not deserve First Amendment protection.[44] Others have argued that racist or sexist speech is "qualitatively and definitively" worse than other forms of unpopular speech, and thus deserves less protection.[45]

Whatever the philosophical justification for campus speech regulations, a university must find a constitutional justification to support the passage of such a restriction. The next section of Part II will address the original constitutional justifications put forth by proponents of speech codes to establish their constitutional validity.

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[42] *See* SHIELL, *supra* note 3, at 31–33 (discussing Mari Matsuda and Richard Delgado's theories about the effects of hate speech on minorities). Mari Matsuda and Richard Delgado cite studies that show hate speech causes feelings of humiliation and isolation, mental illness, and can result in a lack of participation in activities. *Id.; see generally* Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story,* 87 MICH. L. REV. 2320 (1989) (suggesting imposing administrative sanctions against those who use racist speech in public); *see also* Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment,* 60 NOTRE DAME L. REV. 629, 640 n.50 (1985) (discussing the psychological trauma residents of Skokie, Illinois, experienced when confronted with the possibility of having members of the Nazi party walk down their city's streets).

Hentoff criticizes the approach taken by Matsuda and Delgado because he believes it leads to a mindset of victimization, rather than one of empowerment. *See* HENTOFF, *supra* note 2, at 217–18. Another writer argued that college speech codes actually hurt the students they were meant to protect because the codes can give "a false sense of security unavailable outside the college environment." William Shaun Alexander, Note, *Regulating Speech on Campus: A Plea for Tolerance,* 26 WAKE FOREST L. REV. 1349, 1375 (1990). If one of the major purposes of college is to prepare students for the "real world," one could ask: Is sheltering them from it the best teaching strategy?

[43] Hodulik, *supra* note 41, at 1437 (citing the Minutes of the Board of Regents of the University of Wisconsin System from March, April, and June 1989).

[44] One scholar states that since racist or sexist epithets do not try to inform or convince the listener of the speaker's point of view, they are not a tool for discovering the truth. Craddock, *supra* note 31, at 1057. It is possible, however, to be totally unpersuaded by an idea and still learn from the idea. A person can learn a great deal about their own viewpoints by listening to the unpersuasive statements of someone with whom they disagree.

[45] Judge Danny J. Boggs, *Reining in Judges: The Case of Hate Speech,* 52 SMU L. REV. 271, 275–76 (1999).

B. *Constitutional Justifications for Speech Codes*

If the only factor to consider were the effectiveness of speech codes on the elimination of speech that has a demonstrated negative impact on minorities, the debate surrounding college speech codes would not be so heated.[46] Campus speech regulations, however, also implicate First Amendment protections. Thus, proponents of these codes have attempted to develop justifications based upon First Amendment jurisprudence.[47]

1. *The Group Libel/Defamation Model*

This model revolves around the Supreme Court's ruling in *Beauharnais v. Illinois,*[48] which upheld a state statute making it unlawful to use various mediums in a way that portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed, or religion.[49] The Illinois law was designed to "cool the heated rhetoric of white nationalist supremacists . . . [and] was rarely enforced."[50] Although the Illinois law and all other state laws banning group libel were eventually repealed, one case did make it to the Supreme Court. This case, *Beauharnais,* has never been overturned, and thus is technically the law of the land.[51]

Those who favor speech regulations have used the *Beauharnais* decision to constitutionally justify the limitation on speech imposed by these codes.[52] The reasoning behind this model is quite simple.[53] Proponents argue that because the First Amendment, according to the *Beauharnais* decision, does not protect group

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[46] *See* SHIELL, *supra* note 3, at 39.

[47] *Id.* at 39–40.

[48] 343 U.S. 250 (1952).

[49] *Id.* at 266.

[50] SHIELL, *supra* note 3, at 42.

[51] *See id.* at 43. The *Beauharnais* case was a 5-4 decision issued at an early point in the Supreme Court's development of First Amendment protections, and is considered by many no longer to be good law. Strossen, *supra* note 39, at 518. The soundness of *Beauharnais* is even more questionable if considered in light of more recent First Amendment decisions "on related issues, notably its holdings that strictly limit individual defamation actions so as not to chill free speech." *Id.*

[52] *See, e.g.,* Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment,* 17 COLUM. HUM. RTS. L. REV. 11 (1985); Rhonda G. Hartman, *Revitalizing Group Defamation as a Remedy for Hate Speech on Campus,* 71 OR. L. REV. 855 (1992).

[53] In addition to *Beauharnais*'s weak precedential value, *see supra* note 51 and accompanying text, group libel as a justification for speech codes is criticized because it was often used as a weapon to chill the speech of minority groups. Strossen, *supra* note 39, at 520. Moreover, some argue that members of minority groups would not be helped by a policy that requires the maker of the allegedly libelous statement to defend himself by demonstrating it was made with a good faith belief in its truth. *Id.* at 519.

libel and some hate speech constitutes group libel, universities may pass regulations punishing group libel.[54] Proponents of group libel-based speech codes note that the Supreme Court has narrowed, but never overruled *Beauharnais,* while simultaneously upholding several other restrictions on speech such as obscenity, plagiarism, remarks made to captive audiences, and fraud.[55]

2. *The University Mission Model*

The University Mission Model rests upon the Post–Civil War Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments—because of their guarantees of equal opportunity.[56] Proponents contend that hateful speech denies targets of such speech their Fourteenth Amendment right of equal access to educational facilities and, therefore, the state has a duty to restrict the majority's ability to use hate speech.[57] Proponents of this view believe that universities have a special obligation to ensure that they provide non-hostile environments for their minority students.[58] Many American universities hold themselves out to be "havens of diversity," and thus have an obligation to make their campuses suitable for diversity.[59] Some scholars argue that the negative impact of hate speech deprives minorities of the chance to participate in the academic environment provided by universities to non-minorities, who are not exposed to hate speech.[60]

Proponents of the University Mission Model criticize the marketplace of ideas metaphor[61] because inequalities of power can silence minorities, keeping

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[54] SHIELL, *supra* note 3, at 43.

[55] *Id.* at 44–45.

[56] *See id.* at 46.

[57] *See* Craddock, *supra* note 31, at 1056–57.

[58] *Cf. id.*

[59] Glenn & Stephens, *supra* note 35, at 350.

[60] *See* Strossen, *supra* note 39, at 505.

[61] Oliver Wendell Holmes laid out the marketplace of ideas metaphor in his dissenting opinion in *Abrams v. United States,* 250 U.S. 616 (1919):

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Id. at 630. The marketplace theory teaches that people should not fear speech. According to this theory, the best response to speech with which you disagree is not to restrict the speaker's ability to speak, but to reply with your own ideas. In this way, you will ensure that the view with which you disagree is rejected by the marketplace. *But see infra* note 63 and accompanying text (citing arguments that the marketplace metaphor does not work when

those without power out of the marketplace.[62] They argue that because everyone in society is not dedicated to the pursuit of truth, other factors can cause the marketplace to be used for purposes not related to uncovering the truth.[63]

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applied to hate speech). However, practice shows that the marketplace theory can work with hate speech. In 1991, at Arizona State University, four African-American women observed a poster on a dorm room door entitled, "Simplified Form of a Job Application. Form for Minority Applicants." Weinstein, *supra* note 16, at 234 n.202. "The mock application contained such questions as 'source of income: 1) theft, 2) welfare, 3) unemployment' and 'number of legitimate children (if any).'" *Id.* The women spoke with the man on whose door the poster was hung and asked him to take it down, which he agreed to do. *Id.* Instead of bringing charges against the occupants of the dorm room, the four women organized an open meeting in the men's residence hall to discuss the incident and the problem of racism in general. *Id.* Over the next several days, students contributed to the marketplace of ideas by condemning the poster and protesting against racist attitudes on campus. *Id.* A few days later, without any coercion from the university (in fact, the university, though condemning the poster, supported the students' right to espouse racist ideas), the men made a public apology for posting the sign. *Id.; see also* Nat Hentoff, *The Right Thing at ASU,* WASH. POST, June 25, 1991, at A19.

Comparing what happened at Arizona State to Wayne Dick's situation at Yale, the question becomes which method is more effective in dealing with hate speech. The Yale approach made Wayne Dick a First Amendment martyr, and the fact that his sign was offensive was lost on many. Wayne Dick never sincerely apologized for his BAD posters and never was made to learn that he had hurt people. Rather, Dick must have felt that he was being attacked, thus further ingraining the hateful ideas within him. In contrast, the Arizona State approach not only empowered minority students, but also—through the exercise of the First Amendment—taught the students who hung the poster that they had hurt others with their offensive speech. If these students felt like they were being attacked for expressing a particular viewpoint, this feeling derived from the response of their fellow students who made up the community within which they lived.

Furthermore, the marketplace seems to be working because a message of equality is becoming the orthodoxy and racist speech is currently considered dissident speech. See WEINSTEIN, *supra* note 25, at 101 (explaining Weinstein's opinion on "Equality as Orthodoxy" and listing several incidents that support his theory). Weinstein offers the following "thought experiment" for those who doubt his theory: "Imagine a candidate for CEO of a large public corporation who during the interview proclaims his belief in the genetic inferiority of black people." *Id.* Weinstein continues to the conclusion that "[i]t is inconceivable that the candidate would be hired." *Id.*

62 *See* SHIELL, *supra* note 3, at 46.

63 The marketplace image creates the idea that society is like a debate club, where group discussion among club members will lead to the correct answer. Society is not a debate club because a debate club has credentialed participants with obligations of professional courtesy, common frames of reference, knowledge of prior arguments and precedents, and a system for removing unsuccessful debaters from the discussion. *See* Willmoore Kendall, *The "Open Society" and Its Fallacies,* 54 AM. POL. SCI. REV. 972, 977 (1960); *see also* Lawrence, *supra* note 30, at 467–68 (claiming that the marketplace does not work because racism is irrational and often unconscious). *But see* WEINSTEIN, *supra* note 25, at 104–06 (stating that dialogue is one of the main forces in shifting societal attitudes and citing the abolition movement as an example of the effectiveness of the marketplace over time).

Permitting hate speech can reduce the flow of ideas in the marketplace because "the threats implicit in hate speech silence many minorities."[64] Particularly, Cass Sunstein, a respected First Amendment scholar, argues that college campuses are not like city streets in that universities regularly control the speech of faculty and students.[65] Therefore, narrowly tailored hate speech codes should help to maintain a non-hostile environment for minorities while at the same time posing little threat to the marketplace of ideas.[66]

3. *Fighting Words Model*

The Fighting Words Model derives from the Supreme Court's holding in *Chaplinsky v. New Hampshire*,[67] which upheld a state statute prohibiting the making of "any offensive, derisive, or annoying word to any other person."[68] Chaplinsky was proselytizing in a small town in New Hampshire until he had a confrontation with the local authorities.[69] Apparently, during the conversation between Chaplinsky and the officer, Chaplinsky called the officer a "God-damned racketeer" and a "damned Fascist" and the whole town government a bunch of "Fascists."[70] Chaplinsky was arrested, and the Supreme Court upheld his conviction by creating the fighting words doctrine.[71] As originally enunciated

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Weinstein argues that social change takes time and should not be expected to happen overnight, and that social change will not happen without affording protection to dissident speech. *Id.* at 105. In the early 1830s, the abolitionist movement was considered fanatical in the North, but Northern politicians refused to submit to Southern demands to censor such speech. *Id.* A little more than a generation later the abolitionists' message had become the orthodoxy in the North and the moral justification for the North's refusal to allow secession. *Id.* Weinstein sums up the need to preserve the marketplace by writing:

> For it has never been a tenet of free speech that unrestrained public discourse will quickly lead to social progress or even that it will in every instance lead directly to enlightened social policy. Rather, the claim is that, on the whole and over time, unfettered public discussion will lead to a fairer and more just society than will government control of public discourse.

Id. at 105–06.

[64] SHIELL, *supra* note 3, at 46.

[65] *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 199–200 (1993) (stating that universities often place limits on topics that can be discussed in the classroom and require civility in classroom discussions; and that grading and tenure decisions are often based on viewpoint biases of the faculty and administration).

[66] *See id.*

[67] 315 U.S. 568 (1942).

[68] *Id.* at 569.

[69] *Id.* at 570.

[70] *Id.* at 569.

[71] *See id.* at 573. According to Shiell's interpretation of the Court's decision, "Chaplinsky was not protected by the First Amendment because his words did not contribute to the

by the Court, fighting words were "those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[72] Thus, originally, there were two types of fighting words: (1) those which by their very utterance inflict injury and (2) those which tend to incite an immediate breach of the peace.[73]

Since 1942, the Supreme Court has limited the applicability of the fighting words doctrine originally employed in *Chaplinsky*.[74] In fact, since the Court announced its decision in *Chaplinsky,* the Supreme Court has overturned every single fighting words conviction that it has reviewed.[75] In *Gooding v. Wilson,*[76] as well as every other decision on the subject since *Chaplinsky,* the Court disregarded the first category of fighting words announced in *Chaplinsky*.[77] Currently, a regulation restricting fighting words may be applied constitutionally only if the prohibited speech will almost certainly lead to immediate violence.[78]

The logic behind hate speech codes based on the fighting words doctrine is similar to the reasoning of the group libel model. Proponents say that because the First Amendment does not protect fighting words and because some campus hate speech contains fighting words, university speech regulations prohibiting fighting words are constitutional.[79]

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discussion of public issues but rather contributed to public disorder because they were likely to cause the average person to fight." SHIELL, *supra* note 3, at 40–41.

[72] *Chaplinsky,* 315 U.S. at 572.

[73] Although the Court announced two types of fighting words, the Court's decision in *Chaplinsky* rested solely on the second type: those that tend to incite an immediate breach of the peace. *Id.* at 573. Thus, the first category of fighting words was created in the dicta of the Court's opinion. Note that the fighting words doctrine was used in *Chaplinsky* to restrict the speech of a member of a minority group—a Jehovah's Witness—thus, like group libel, the fighting words doctrine can be used to suppress the speech of those whom universities seek to protect by implementing speech regulations. *See also infra* note 197 (stating that hate crime statutes are also applied against those they were supposedly designed to protect).

[74] Strossen, *supra* note 39, at 508–09 (discussing how the Court has narrowed the fighting words doctrine).

[75] *See id.* at 510 n.127 (listing several Supreme Court decisions that have overturned convictions based upon fighting words statutes).

[76] 405 U.S. 518 (1972).

[77] *See id.* at 523 (eliminating from the definition of fighting words those words that inflict injury by their very utterance).

[78] Strossen, *supra* note 39, at 509. Because of the limitations of the fighting words doctrine, the University of Texas system expressly refused to use this model to create a campus regulation. *Id.* at 513.

[79] SHIELL, *supra* note 3, at 41.

C. *The Constitutional Justifications for Hate Speech Codes are Tested in Court*

With the two sides of the hate speech code debate believing so strongly in their viewpoints, it was only a matter of time before the issue wound up in the federal court system. The following section will discuss how the courts have addressed the issue of campus hate speech regulations.

1. Doe v. University of Michigan

In what has become one of the most important First Amendment decisions in recent decades,[80] the United States District Court for the Eastern District of Michigan, in *Doe v. University of Michigan,*[81] struck down a hate speech code as an impermissible infringement upon the First Amendment.[82] The *University of Michigan* decision represents the first time a federal court considered the constitutionality of a university's hate speech code. The fact that the court

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[80] Although some proponents of hate speech codes originally discounted the *University of Michigan* decision as simply a court striking down a poorly written speech regulation, time and similar decisions by other federal courts demonstrate that this decision should not have been ignored. *See, e.g.,* Lawrence, *supra* note 30, at 477 n.161:

> I believe that there is an element of unconscious collusion in the inability of universities, some with top notch legal staffs and fine law schools, to draft narrow, carefully crafted regulations. For example, it is difficult to believe that anyone at the University of Michigan Law School was consulted in drafting the regulation that was struck down at that university. It is almost as if university administrators purposefully wrote an unconstitutional regulation so they could say to black students, "We tried but the courts just won't let us."

Id. (citations omitted). *See generally* Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,* 39 STAN. L. REV. 317 (1987) (discussing unconscious racism and its effects on society).

Robert Sedler, the attorney who argued against the University of Michigan's regulation, believed *University of Michigan* would be a landmark decision with a tremendous effect on future speech codes. Robert A. Sedler, Doe v. University of Michigan *and Campus Bans on "Racist Speech": The View From Within,* 37 WAYNE L. REV. 1325, 1327–28 (1990). Sedler noted that the University of Michigan did not hastily or carelessly throw together its speech code. Rather the code went through several drafts and was carefully worded in an attempt to achieve its objective and also be deemed constitutional. *Id.; see also* Siegel, *supra* note 16, at 1390–91 (citing Tufts University as an example of a university that decided to repeal its speech code after the *University of Michigan* decision was handed down).

[81] 721 F. Supp. 852 (E.D. Mich. 1989).

[82] *Id.* at 868 ("While the Court is sympathetic to the university's obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech.").

invalidated the code sent a strong message that these codes will be highly scrutinized for constitutional infirmities.[83]

In response to an increasing number of incidents of racism on campus, and after the threat of a class action suit by a student group against the university for failing to maintain or create a non-racist atmosphere on campus, the University of Michigan enacted a policy regulating hate speech on campus.[84] The university's policy identified different areas of the campus and made the level of speech tolerated dependent upon where on campus the speech occurred.[85] For example, the regulation applied to "educational and academic centers," and in these areas students were subject to discipline for verbal behavior that "stigmatizes or victimizes an individual on the basis of race" and "[c]reates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored . . . activities."[86] The university's Office of Affirmative Action issued an interpretive guide to provide the students with guidance on what would constitute sanctionable conduct.[87]

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[83] In his conclusion, District Judge Cohn quoted from the University of Michigan's own policy to show that speech codes are inconsistent with the principle of free expression: "In all instances, the university authorities should act with maximum constraint, even in the face of obvious bad taste or provocation. The belief that some opinion is pernicious, false, or in any other way detestable cannot be grounds for its suppression." *Id.* A university having such a policy, while at the same time attempting to punish speech it finds offensive, is as hypocritical as the letter Wayne Dick received from Giamatti. *See supra* note 21. Apparently, maximum constraint at the University of Michigan did not mean much.

[84] *See Univ. of Mich.*, 721 F. Supp. at 854–56 (describing the situation at the University of Michigan that led to the creation of the school's speech code).

[85] *Id.* at 856. The University of Michigan's plan was similar to the argument made by James Weinstein in his article *A Constitutional Roadmap to the Regulation of Campus Hate Speech,* 38 WAYNE L. REV. 163 (1991). It is interesting that nowhere in the article does the author mention the *University of Michigan* decision, which, though not identical to the author's proposal, was at the very least similar. This could support Robert Sedler's theory that proponents of hate speech codes would at least initially disregard the *Doe* decision. *See supra* note 80 and accompanying text.

[86] *See Univ. of Mich.*, 721 F. Supp. at 856.

[87] The guide was entitled "What Students Should Know about Discrimination and Discriminatory Harassment by Students in the University Environment." The guide was purported to be authoritative. Some of the sanctionable conduct listed in the guide included:

> A flyer containing racist threats distributed in a residence hall. Racist graffiti written on the door of an Asian student's study carrel. A male student makes remarks in class like "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates. Students in a residence hall have a floor party and invite everyone on their floor except one person because they think she might be a lesbian.

Id. at 858. In addition, the guide provided a helpful section for determining if you in fact are a harasser entitled "You are a harasser when . . . ."

> You exclude someone from a study group because that person is of a different race, sex, or ethnic origin than you are. You tell jokes about gay men and lesbians. Your student organization

John Doe was a graduate student studying biopsychology at the University of Michigan.[88] Doe worked with theories examining biological differences between the sexes and races and feared that some students might find his work sexist or racist.[89] Because of the university's speech policy and its sanctions, Doe was apprehensive about discussing his theories.[90] Doe challenged the university's speech code, not because he had been prosecuted under it, but rather, he wanted it struck down to avoid being prosecuted under the code.[91] Doe challenged the policy saying that it had infringed upon his right to "freely and openly" discuss his theories and because the speech code was unconstitutionally vague and overbroad.[92]

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sponsors entertainment that includes a comedian who slurs Hispanics. You display a confederate flag on the door of your room in a residence hall. You laugh at a joke about someone in your class who stutters.

Id.

Apparently, this guide was withdrawn sometime during the winter of 1989 because "the information in it was not accurate," but this withdrawal was never announced publicly. *Id.* at 857–58. Although this guide was eventually withdrawn, the university obviously believed there was nothing wrong with punishing students for laughing at a joke. The guide highlights one of the major problems with hate speech codes in that the only speech that is punished by the codes is the speech that the group in power finds offensive. The problem is that the Supreme Court has long held that the State does not possess the power to outlaw certain speech based solely on content. *See, e.g.*, Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (stating that the First Amendment must be protected with great vigilance).

The university's guide may have contained some absurd passages, but the idea of giving students warning as to what types of speech would be sanctionable is a noble idea. Speech codes have been criticized for being too vague because often individuals do not know that their speech is sanctionable until they are punished. *See Univ. of Mich.*, 721 F. Supp. at 866–67 (stating that the Michigan code was unclear on exactly what speech would be punishable); Strossen, *supra* note 39, at 529 ("Any anti-hate speech rule entails some vagueness, due to the inherent imprecision of key words and concepts common to all such proposed rules."). The university's guide attempted to warn the students about what speech would be sanctioned, thus reducing the post facto element of the speech code.

[88] *Univ. of Mich.*, 721 F. Supp. at 858.

[89] *Id.*

[90] *Id.*

[91] SHIELL, *supra* note 3, at 75. *See Univ. of Mich.*, 721 F. Supp. at 859 ("It is well settled that an individual has standing to challenge the constitutionality of a penal statute if he or she can demonstrate a realistic and credible threat of enforcement. . . . [This] threat of enforcement must be specific and direct and against a particular party.") (citations omitted). Evidently, Doe did not want to risk falling prey to the same fate that befell Wayne Dick. By taking the university to court, Doe, unlike Dick, did not give the University of Michigan a chance to punish him post facto for speech it found offensive.

[92] *Univ. of Mich.*, 721 F. Supp. at 858.

District Judge Cohn began his opinion by quoting a passage from Lee Bollinger's *Tolerant Society,* highlighting the fact that judges have little leeway in dealing with regulations restricting protected speech.[93] Apparently, no matter how despicable Judge Cohn felt hate speech was, if the university's speech code restricted protected speech, he would have little choice but to strike the regulation down. Before deciding that the regulation was unconstitutional, the court looked at the plain language of the regulation,[94] the legislative history of the regulation,[95] and the university's practice of enforcing the regulation against protected speech.[96]

Looking more closely at the court's opinion, the judge began by describing several "categories of conduct" where a university may impose sanctions without violating the First Amendment.[97] Next, the court discussed examples of speech the university could not sanction.[98] Specifically, the court wrote that the university could not prohibit speech "because it disagreed with [the] ideas or [the] messages sought to be conveyed," nor because the speech "was found to be offensive, even gravely so, by large numbers of people."[99] The court also noted

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[93] From the very beginning of the opinion, proponents of the university's speech code had to be disheartened because the first passage of the opinion went as follows:

> [T]aking stock of the legal system's own limitations, we must realize that judges, being human, will not only make mistakes but will sometimes succumb to the pressures exerted by the government to allow restraints [on speech] that ought not to be allowed. To guard against these possibilities we must give judges as little room to maneuver as possible and, again, extend the boundary of the realm of protected speech into the hinterlands of speech in order to minimize the potential harm from judicial miscalculations and misdeeds.

Id. at 853 (quoting LEE BOLLINGER, THE TOLERANT SOCIETY 78 (1986)).

[94] *Id.* at 859 (discussing how the words "stigmatize" and "victimize" are not self-defining and rely upon "some exogenous value system" for enforcement).

[95] *Id.* at 859–60 (discussing how the university's policy was designed to sanction the speech which "seriously offend[ed] many individuals").

[96] *Id.* at 861 (explaining that in the year the policy was in effect it was used at least three times against students who were disciplined for controversial comments made in a classroom or research setting simply because the comments offended others).

[97] Among the categories of conduct listed were sexual harassment, vandalism and property damage for the purpose of intimidation, fighting words, intentional infliction of emotional distress, incitement of immediate lawless action, obscenity, and libel and slander. *Id.* at 861–63.

[98] *Id.* at 863.

[99] *Id.* The court cited to several cases for these principles, including the Texas flag burning case, *Texas v. Johnson,* 491 U.S. 397 (1989), and *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624 (1943), in which the Supreme Court wrote: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642. Judge Cohn's decision in many ways parallels the conclusions of the Woodward Report that Wayne Dick used as the focal point of his defense to Yale's offensive speech charges. "It may sometimes be necessary in a university

that "[t]hese principles acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission."[100] Judge Cohn wrote that it was with these principles in mind that he would analyze the university's policy to determine if the scope of the regulation sanctioned speech "otherwise protected by the First Amendment."[101]

Although the university argued that the policy did not apply to protected speech, the court found that the policy was, in fact, applied on several occasions to speech protected by the First Amendment.[102] The court found three instances where the university either disciplined or threatened to discipline students for statements made in the course of an academic discussion.[103] One of these incidents involved a remark made during a group discussion in a difficult upper-level dentistry class.[104] The group was formed for the purpose of informally discussing anticipated problems the class might pose for its students.[105] During the discussion, one student stated that "he had heard that minorities had a difficult time in the course and that he had heard that they were not treated fairly."[106] The professor filed charges against the student complaining that the statement was unfair and could hurt her chances of gaining tenure.[107] The court concluded its analysis of the overbreadth argument by stating that "[t]he manner in which these

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for civility and mutual respect to be superseded by the need to guarantee free expression." Woodward Report, *supra* note 15; *see also supra* notes 13–16 and accompanying text. This similarity is significant because Yale University is a private school, and thus not required to adhere to the principles of the First Amendment, yet through the Woodward Report, First Amendment principles were still incorporated into the school's disciplinary code. *See supra* note 16 (discussing the difference between public and private schools in relation to the First Amendment).

[100] *Univ. of Mich.*, 721 F. Supp. at 863; *see also* MEIKLEJOHN, *supra* note 15, at 253 (discussing the importance of having a place for active discussion among the members of our self-governing society).

Additionally, writing in dissent in 1969 a Sixth Circuit Judge wrote that speech on a college campus must be considerably more disruptive than speech in a high school to justify a limitation. *See* Norton v. Discipline Comm. of East Tenn. State Univ., 419 F.2d 195, 210–11 (6th Cir. 1969) (Celebrezze, J., dissenting). In this case, students were suspended from college for passing out literature that called upon students to stand up for their rights. *Id.* at 196–97. Although the majority of the Sixth Circuit upheld this suspension in 1969, I question if the court today would reach the same conclusion, or instead adopt the thinking of Judge Celebrezze.

[101] *Univ. of Mich.*, 721 F. Supp. at 863–64.

[102] *See id.* at 866.

[103] *See id.* at 865–66 (describing three instances where the university brought charges against a student for making statements during academic discussions that fell well within the protections of the First Amendment).

[104] *Id.* at 866.

[105] *Id.*

[106] *Id.*

[107] *Id.*

three complaints were handled demonstrated that the University considered serious comments made in the context of classroom discussion to be sanctionable under the Policy... [and that the] University could not seriously argue that the policy was never interpreted to reach protected conduct."[108] Therefore, the court found the university's regulation to be "overbroad both on its face and as applied."[109]

The court concluded its analysis of the university's policy by addressing Doe's contention that the regulation was unconstitutionally vague. Citing *Broadrick v. Oklahoma,*[110] the court stated that "[a] statute must give adequate warning of the conduct which is to be prohibited and must set out explicit standards for those who apply it."[111] Judge Cohn found the key words of the regulation to be "stigmatize" and "victimize," both of which "elude precise definition."[112] The court found it difficult to determine what conduct would be held to "victimize or stigmatize."[113] Thus, students would be "forced to guess at whether a comment about a controversial issue would later be found to be sanctionable under the policy."[114] Because of this uncertainty, the court also found the university's policy to be unconstitutionally vague.[115]

2. UWM Post, Inc. v. Board of Regents of the University of Wisconsin

In May of 1988, the Board of Regents for the University of Wisconsin System announced a plan called "Design for Diversity," which attempted to increase minority representation, multi-cultural understanding, and diversity

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[108] *Id.*

[109] *Id.*

[110] 413 U.S. 601 (1973).

[111] *Univ. of Mich.,* 721 F. Supp. at 866.

[112] *Id.* at 867. In addition, the court remarked that simply because "a statement may victimize or stigmatize an individual does not... strip it of protection under the accepted First Amendment tests." *Id.*

[113] *Id.* In order to demonstrate how difficult it was to differentiate between sanctionable and non-sanctionable speech, Judge Cohn included the following passage: "During the oral argument, the Court asked the university's counsel how he would distinguish between speech which was merely offensive, which he conceded was protected, and speech which 'stigmatizes or victimizes' on the basis of an invidious factor. Counsel replied 'very carefully.'" *Id.* Unfortunately for students, "very carefully" does not provide much warning as to what controversial speech will be sanctioned and what will not. To quote from Wayne Dick's appeal letter to president Giamatti: "If my sentence is not overturned, please advise me as to other views that I am not allowed to criticize, so that I won't unknowingly violate my probation and the standards of Yale University." *See supra* note 20.

[114] *See Univ. of Mich.,* 721 F. Supp. at 867.

[115] *See id.* at 867.

throughout the education system.[116] The Design for Diversity was announced in response to concerns over several racially motivated incidents throughout the school system and included a provision to establish a committee charged with drafting a system-wide hate speech code.[117] Because the University of Wisconsin was aware that a court struck down Michigan's speech code, Wisconsin designed a regulation far superior in both scope and clarity to Michigan's code.[118] The Board of Regents adopted the committee's proposed rule on June 9, 1989,[119] and in a little over a year, at least nine students were punished under the university's speech regulation.[120] On March 29, 1990, the UWM Post. and several individual students filed suit against the Board of Regents, challenging the constitutionality of the university's speech code by claiming that it violated their First Amendment rights.[121] The university defended the regulation by arguing that the rule limited only speech falling within the fighting words exception to the First Amendment, or in the alternative, that the *Chaplinsky* decision sets forth a balancing test leaving the speech prohibited by the university's regulation unprotected by the First Amendment.[122]

The court's decision begins with a discussion of the *Chaplinsky* decision[123] and how the Supreme Court has narrowed the holding of *Chaplinsky*.[124] The court continued by applying the elements of the university's regulation to the fighting words doctrine. The court concluded that the school's first defense failed because the rule did not require that the regulated speech, by its very utterance, tends to incite an immediate breach of the peace; thus, the "rule goes beyond the

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[116] UWM Post, Inc. v. Bd. of Regents, 774 F. Supp. 1163, 1164 (E.D. Wis. 1991).

[117] *See id.* at 1164–65 (describing the development of the University of Wisconsin's speech regulation).

[118] SHIELL, *supra* note 3, at 78 (explaining how Wisconsin's speech code was more limited in scope and was written with a higher degree of clarity).

[119] *See UWM*, 774 F. Supp. at 1165–67. The court excerpts the University of Wisconsin's speech regulation and part of the pamphlet the university circulated after the adoption of the rule, which provided students with guidance as to the scope and application of the rule. *See id.*

[120] *Id.* at 1167–68 (describing the situations surrounding the nine cases brought under the university's speech regulation).

[121] *Id.* at 1164.

[122] *Id.* at 1169.

[123] *See id.* at 1169–70 (discussing the fighting words doctrine and how it has been narrowed throughout the years); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[124] *See UWM*, 774 F. Supp. at 1169–70. The court cites several cases to show that the fighting words doctrine has been limited to those words that tend to incite an immediate breach of the peace, including *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978). In *Collin*, the Seventh Circuit struck down a town ordinance that prohibited the Nazi party from parading in the streets of Skokie, Illinois, because the village did not "rely on a fear of responsive violence to justify the ordinance." *Id.* at 1203. In the decision, the court stated: "A conviction for less than words that at least tend to incite an immediate breach of the peace cannot be justified under *Chaplinsky*." *Id.* (citing Gooding v. Oklahoma, 405 U.S. 518, 524–27 (1972)).

present scope of the fighting words doctrine."[125] The court noted that "[t]he creation of a hostile environment may tend to incite an immediate breach of peace under some circumstances," but the creation of a hostile environment can create non-violent situations as well.[126] The court, while acknowledging that it was reasonable to expect hate speech to provoke a violent reaction, found that the university's rule was overbroad in that it regulated speech "whether or not it [was] likely to provoke such a response."[127] Since the regulation covered speech that did not fall within the narrow definition of fighting words, the rule could not be justified under the fighting words doctrine alone.

Next, the court considered whether the *Chaplinsky* decision set forth a balancing test for determining if the speech regulated by the university's speech code was actually protected by the First Amendment. The university argued that the *Chaplinsky* Court used a balancing test to determine that fighting words were not protected by the First Amendment[128] and that under this same test the speech regulated by the school's code was also not protected.[129] The court acknowledged that the Supreme Court used a balancing test to determine whether fighting words were protected by the First Amendment, but the court did not find evidence in the *Chaplinsky* decision indicating that the Supreme Court intended to allow lower courts to "employ a balancing approach to identify additional categories of speech undeserving of protection."[130] Although the court stated that the university's balancing test was not applicable, the court found that even if a balancing test was used, the regulation was still invalid because the costs of the rule outweighed the benefits.[131]

The university also attempted to justify its speech regulation by drawing an analogy to Title VII law and its prohibition against the creation of a hostile

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[125] *UWM*, 774 F. Supp. at 1172.

[126] *Id.*

[127] *Id.* at 1173.

[128] *See id.* (quoting *Chaplinsky*, 315 U.S. at 572: "It has been well observed that ['fighting words'] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

[129] *See id.*

[130] *Id.* The court also discussed the fact that the university's regulation was a content-based restriction and that the Supreme Court is much more wary about upholding regulations that are content-based. The court noted that the Supreme Court is more willing to allow a restriction that "restrict[s] communication without regard to the message conveyed." The university's regulation is not content-neutral, but rather limits speech based upon the message conveyed, and thus receives a much closer degree of scrutiny. *Id.* at 1174 (quoting Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 81 (1978)).

[131] *See UWM*, 774 F. Supp. at 1174–77 (analyzing the costs and benefits of the university's speech code).

environment in the workplace.[132] The court was unwilling to accept this analogy for three reasons. Foremost, Title VII was meant to apply in the workplace, not in the educational setting.[133] Secondly, Title VII looks to agency principles for its justification, and normally students are not agents of their school.[134] Lastly, Title VII is only a statute and cannot supersede the requirements of the First Amendment, so the regulation's First Amendment infirmities would still cause the rule to be deemed unconstitutional.[135]

3. Sigma Chi v. George Mason University

Unlike the previous two cases, *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*[136] did not involve a challenge to an explicit hate speech code, but rather, a fraternity challenging the constitutionality of a disciplinary sanction imposed by a university.[137] As part of Derby Days, a week-long fundraiser hosted by the Iota Xi chapter of Sigma Chi at George Mason, the fraternity held an event called the "Dress a SIG contest" in which members of the fraternity were dressed as "ugly women."[138] One member of the fraternity wore black face paint, used pillows to represent breasts and buttocks, and wore a wig with curlers.[139] The following week, several campus student leaders petitioned the school to discipline the fraternity because they were offended by the contest and believed the contest "perpetuated racial and sexual stereotypes."[140] One week later the university announced that it would sanction the fraternity.[141]

The fraternity contended that the school's punishment unconstitutionally infringed upon its members' right to free expression protected by the First Amendment.[142] The university countered by arguing that the fraternity's activity

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[132] *Id.* at 1177.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] 773 F. Supp. 792 (E.D. Va. 1991).

[137] *See id.* at 792–93.

[138] *Id.* at 793 (describing the "Dress a SIG" contest).

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *See id.* at 793–94 (explaining the plaintiff's and defendant's theories of the case). The Supreme Court has held that the First Amendment must be given "breathing space" in order to function properly. NAACP v. Buttons, 371 U.S. 415, 433 (1963) (citing Cantwell v. Connecticut, 310 U.S. 296, 311 (1940)). Speech will undoubtedly be chilled if speakers are forced to defend everything they say against criminal charges. Furthermore, the Court has held that even when a speaker is motivated by hate or ill will his speech is still protected by the First Amendment:

was not expression protected by the First Amendment. In the alternative, the school contended that it had a compelling educational interest that justified the sanctions imposed upon the fraternity.

The court began its opinion by stating the basic principle that state universities cannot limit speech simply because they feel exposure to one group's ideas will be harmful to other groups of students.[143] The court dismissed the university's contention that the fraternity's contest was conduct rather than protected speech by noting that it was the expressive message conveyed by the fraternity that was perceived offensive by the other students.[144] The university did not punish the fraternity for the act of dressing up, rather Sigma Chi was punished for the message expressed when the fraternity members dressed the way they did.

Next, the court acknowledged that the university had an interest in maintaining a diverse student body,[145] but that the speech involved in this case was consistent with another interest of the university—promoting the free flow

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> Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.

Garrison v. Louisiana, 379 U.S. 64, 73 (1964). Although its holding dealt specifically with the defamation of a public figure, *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46 (1988), describes how important parody and satire have been to the formation of our country. *Id.* at 53–55. Satire, almost by definition, must be offensive to someone and will often go "beyond the bounds of good taste and conventional manners." This does not, however, limit its First Amendment protection. *Id.* at 54.

Accordingly, Wayne Dick's parody posters and the "Dress a SIG" contest held at George Mason University do not lose their First Amendment protections simply because people were offended by them. Wayne Dick's poster deserved the highest level of First Amendment protection because it discussed, through satire, a public affair taking place within his community, and the Supreme Court has stated, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison,* 379 U.S. at 74–75.

[143] *George Mason,* 773 F. Supp. at 793. The court stated in its conclusion that "[a]lthough the university disagreed with the message propounded by the fraternity's activity, GMU may not discipline the students by infringing on their First Amendment rights based on the perceived offensive content of the activity." *Id.* at 795. The court went on to say that to punish the fraternity's speech for its perceived offensiveness is equivalent to imposing a "heckler's veto," that is, allowing the listener to prevent speech because the listener does not agree or approve. *Id.* The heckler's veto has been deemed an impermissible infringement of the First Amendment. *Id.; see also* Downs, *supra* note 42, at 634 ("To allow hostile audiences to cause the abridgement of speech in such instances would be to make audiences the ultimate judges of constitutional rights.").

[144] *See George Mason,* 773 F. Supp. at 794.

[145] More specifically, the university claimed the fraternity's behavior undermined "the education of minority and women students, the university's mission to promote learning through a culturally diverse student body, the university's mission to eliminate racist and sexist behavior on campus and the university's mission to accomplish maximal desegregation of its student body." *Id.*

and expression of ideas.[146] The court held that, because the fraternity's contest did not substantially nor materially disrupt the university's educational mission, the school was not justified in punishing the fraternity.[147]

4. Dambrot v. Central Michigan University

In *Dambrot v. Central Michigan University,*[148] the Sixth Circuit Court of Appeals was faced with deciding whether the district court had properly struck down a university's discriminatory harassment policy as being facially unconstitutional. The case arose out of an incident where the school's basketball coach told his players during a locker room session that they "need[ed] to have more niggers on our team."[149] The players often referred to themselves as niggers to connote "a person who is fearless, mentally strong and tough."[150] Coach Dambrot stated that he used the term in the same positive manner as the players used it.[151] In addition, none of the African-American players stated that they were offended by the coach's use of the word.[152] One member of the school's affirmative action office believed the coach's comments violated the university's harassment policy and recommended he be disciplined.[153] Dambrot accepted an informal punishment instead of a more formal investigation and possibly a more severe punishment.[154]

However, on April 12, 1993, the school's athletic director informed Coach Dambrot that the school would be hiring a new head basketball coach for the next season.[155] The announcement of Coach Dambrot's termination came after national news attention was drawn to the university by student demonstrations protesting Dambrot's comments.[156] The coach then filed suit against the university claiming that he was fired because he used the word "nigger," and thus, his termination violated the First Amendment.[157] Several members of the

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146 *Id.*

147 *Id.*

148 55 F.3d 1177 (6th Cir. 1995).

149 *Id.* at 1180. Supposedly, the coach asked the players if it was acceptable for him to use the word "nigger" before he made his comments. *Id.*

150 *Id.*

151 *Id.*

152 When people outside the basketball team found out Coach Dambrot had used the word "nigger," the school interviewed all the members of the basketball team and none reported being offended by the coach's comments. *Id.* at 1181.

153 *Id.*

154 *Id.*

155 The university stated that it "believed Dambrot was no longer capable of effectively leading the men's basketball program." *Id.*

156 *Id.*

157 *Id.*

basketball team joined the suit claiming the university's harassment policy was unconstitutionally overbroad and vague in violation of their First Amendment rights.[158]

The district court ruled that the university's discriminatory-harassment policy was unconstitutional on its face.[159] On appeal, the Sixth Circuit stated that the "first step in analyzing an overbreadth claim is to 'determine whether the regulation reaches a substantial amount of constitutionally protected speech.'"[160] The university defended its policy by claiming that the policy contained a provision explicitly protecting students' First Amendment rights.[161] The court cited the University of Michigan's failed defense in *University of Michigan,* namely that the school would not enforce its speech code in such a way as to offend the First Amendment.[162] The court in *University of Michigan* found the code was applied on several occasions to speech protected by the First Amendment.[163] The *Dambrot* court concluded its analysis of step one by stating "there is nothing to ensure the university will not violate First Amendment rights even if that is not their intention. It is clear from the text of the policy that language, . . . regardless of political value, can be prohibited upon the initiative of the university."[164] The possibility of the almost unlimited scope of the school's policy creates a "realistic danger" that the regulation could be used to violate First Amendment protections.[165]

The second step in analyzing an overbreadth claim is to determine "whether the policy is 'substantially overbroad and constitutionally invalid under the void for vagueness doctrine.'"[166] There are two ways a regulation may be unconstitutionally vague: (1) it denies fair notice of sanctionable conduct and (2) it is an unrestricted delegation of power to leave the definition to those enforcing it.[167] In this case, Central Michigan's policy prohibited conduct considered offensive by the university. However, the court stated that "different

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158 *Id.*

159 *See generally* Dambrot v. Cent. Mich. Univ., 839 F. Supp. 477 (E.D. Mich. 1993). The district court also held that the termination of the coach did not violate the Constitution, however this note is only concerned with the court's holding pertaining to the harassment policy.

160 *Dambrot,* 55 F.3d at 1182.

161 Specifically, the harassment policy contained a provision, which read: "'The university will not extend its application of discriminatory harassment so far as to interfere impermissibly with individuals['] rights to free speech.'" *Id.* at 1183.

162 *Id.*

163 *See supra* note 96 (discussing the University of Michigan's enforcement of its speech policy against speech protected by the First Amendment).

164 *Dambrot,* 55 F.3d at 1183.

165 *Id.* at 1181.

166 *Id.* (quoting Leonardson v. City of E. Lansing, 896 F.2d 190, 195–96 (6th Cir. 1990)).

167 *See id.* at 1183–84 (describing the two ways a statute can be unconstitutionally vague).

people find different things offensive."[168] The facts of this case clearly illustrate the court's point. Several players stated that Coach Dambrot's comment did not offend them, but the statement offended those who complained about it to the university. Because the policy allowed university officials to define what speech would violate the regulation, the court found the statute to be unconstitutionally vague.[169]

D. *Summing Up the Lower Federal Court Cases*

Each of these four cases struck a major blow against the proponents of campus hate speech codes. The *University of Michigan* decision represents the first case to address the constitutionality of campus speech codes and thus laid out the general principles for analyzing speech regulations.[170] The judge in *University of Michigan* was aware that the university had a duty to provide equal educational opportunities, but held that this goal could not be achieved at the expense of the First Amendment.[171] For those who discounted the *University of Michigan* decision as simply a court striking down a poorly written speech regulation, the *UWM* decision could not have been good news. First, the University of Wisconsin was aware of the *University of Michigan* decision and could presumably use the decision to aid in crafting a regulation that would be constitutional. Second, when challenged in court, the University of Wisconsin employed a much more sophisticated defense than the University of Michigan used in defending its speech code.[172] With both of these factors working in its favor, Wisconsin's hate speech regulation was still struck down as an unconstitutional infringement of the First Amendment.

George Mason and *Central Michigan* reversed decisions by state universities to discipline speech, but in these cases there was no explicit hate speech code in place. The courts, however, applied the analysis employed when an explicit hate

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[168] *Id.* at 1184.

[169] *Id.* ("The CMU policy, as written, does not provide fair notice of what speech will violate the policy. Defining what is offensive is . . . wholly delegated to university officials . . . . For these reasons, the CMU policy is also void for vagueness.").

[170] In *University of Michigan,* the court announced four principles for analyzing hate speech codes. One, a university cannot regulate speech because it disagrees with the ideas or message conveyed. Two, a university cannot regulate speech because it finds the speech offensive. Three, a university cannot regulate speech because it believes others will find the speech offensive. Four, these principles need to be even more stringently enforced in the university setting because the need for an "unfettered interplay of competing views is essential to the institution's educational mission." Doe v. Univ. of Mich., 721 F. Supp. 852, 863 (E.D. Mich. 1989).

[171] *Id.* at 868.

[172] The University of Wisconsin argued that the regulation was justified under the fighting words doctrine, under the balancing test laid out in *Chaplinsky,* and under an analogy to Title VII law. *UWM,* 774 F. Supp. at 1169.

speech code exists to a situation where the speech regulation was implicit, thus reaffirming and demonstrating the strength of the principles set forth in *University of Michigan* for analyzing these attempts to regulate campus speech.[173] Both cases also added to the analysis of campus hate speech codes by explicitly rejecting the compelling educational interest argument[174] and by stating that the regulation cannot make an "unrestricted delegation of power" to university officials to define what is offensive, thus eliminating any level of notice.[175]

Finally, all four cases support the proposition that a state university cannot prohibit speech because it finds the speech offensive or it disagrees with the speech. Most importantly, all four decisions affirm the idea that a state university cannot achieve certain goals by sacrificing the protections guaranteed by the First Amendment.

E. *The Supreme Court Chimes In*

In 1992, the Supreme Court entered the fray by addressing the constitutionality of a city ordinance prohibiting the placing on public or private property "a symbol, object, appellation, characterization or graffiti . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[176] Although this case did not involve a campus hate speech code per se, the Court's First Amendment analysis can be applied to the university setting. In *R.A.V. v. City of St. Paul,* a juvenile petitioner was prosecuted under this city ordinance for burning a cross on the property of a black family that lived in the community.[177] R.A.V. moved to dismiss the charges contending the ordinance was both overbroad and impermissibly content-based under the First Amendment.[178] Although the Minnesota Supreme Court upheld the ordinance,[179] the Supreme Court reversed

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[173] *See supra* notes 93–101 and accompanying text.

[174] Sigma Chi v. George Mason Univ., 773 F. Supp. 792, 794 (E.D. Va. 1991).

[175] Dambrot v. Cent. Mich. Univ., 55 F.3d. 1177, 1183–84 (6th Cir. 1995).

[176] R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1992) (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

[177] *Id.* at 379.

[178] *Id.* at 380.

[179] *Id.* at 380–81. The Minnesota high court limited the ordinance's coverage so that it only prohibited fighting words, and therefore held the ordinance did not violate the First Amendment because fighting words are capable of being regulated consistent with the First Amendment. Additionally, the court found that the "ordinance [was] narrowly tailored" to achieve the compelling state interest of preventing bias-motivated crimes. *Id.* The United States Senate Committee on the Judiciary apparently agreed with the Minnesota high court because the committee submitted a report with the following language: "The hate crime atomizes the individual, splitting the individual victim apart from his or her neighbors and community. It isolates the victim because of who he or she is." S. REP. NO. 104-269, at 3 (1996).

this decision and held that the ordinance violated First Amendment protections.[180]

The Supreme Court, through Justice Scalia, stated that content-based regulations are presumptively invalid[181] and that even the narrow categories referred to in *Chaplinsky*[182] are not "worthless and undeserving of constitutional protection."[183] The Court also stated that the power to restrict speech on one basis does not translate into the government being able to regulate the same speech on some other basis.[184] For example, the state could pass a statute banning obscenity on television, but allowing all other forms of obscenity because this prohibition would not be content-based.[185] Whereas, the state could not—consistent with the First Amendment—ban defamation against the Republican party while allowing defamation against the Democratic party.[186]

Applying these concepts to the St. Paul ordinance, the Court stated that this regulation only prohibits fighting words that provoke violence on the basis of race and gender while allowing all other types of fighting words.[187] In essence, the city was attempting to place limitations on speakers who espouse views on subjects that St. Paul's city council deemed "disfavored."[188] Moreover, the Court stated that this ordinance is more than just content biased; it is also viewpoint biased.[189] Under this ordinance, "[o]ne could hold up a sign saying, for example,

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Others propose strong reasons why the state should not sanction hate speech. Lawrence, *supra* note 30, at 435–36 ("There are very strong reasons for protecting even racist speech. Perhaps the most important reasons are that it reinforces our society's commitment to the value of tolerance, and that by shielding racist speech from government regulation, we will be forced to combat it as a community."). *See generally* BOLLINGER, *supra* note 93.

180 *R.A.V.*, 505 U.S. at 391 (stating that the ordinance was facially unconstitutional even when narrowly construed).

181 *Id.* at 382.

182 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (referring specifically to obscenity, defamation, and fighting words).

183 *R.A.V.*, 505 U.S. at 385 (quoting concurring opinion at 401).

184 *Id.* at 385–86. The Court compares fighting words to sound coming out of a "noisy sound truck" because both are a mode of speech. The government can regulate the sound truck but not on the basis of the message coming out of the sound truck. *Id.*

185 *Id.* at 386–87 (comparing the "noisy sound truck" to fighting words).

186 To allow the government to pass laws prohibiting defamation against only the Republican party would "raise[] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 387 (quoting Simon & Schuster, Inc. v. Members of the N.Y. Crime Victims Bd., 502 U.S. 105, 116 (1991)).

187 *R.A.V.*, 505 U.S. at 391 ("Those who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered.").

188 *Id.*

189 *Id.*

that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.'"[190]

The city, making an argument similar to those made in the campus hate speech cases, contended that it had an obligation to confront notions of bigotry. The Supreme Court agreed that the city had such an obligation, but "the manner of that confrontation cannot consist of selective limitations upon speech."[191] The Court emphasized that regulation of fighting words is not based on the idea the speaker wishes to convey, but rather the mode of communicating those ideas.[192] The St. Paul ordinance did not simply proscribe a particular mode of expression, but rather, proscribed a particular mode of expression based on the viewpoint expressed.[193] The Supreme Court held that this type of viewpoint censorship cannot be tolerated.[194]

A year later, the Supreme Court addressed hate crimes again in *Wisconsin v. Mitchell*.[195] The defendant in *Mitchell* was convicted of aggravated battery, a crime normally carrying a maximum sentence of two years in prison.[196] However, because the jury found that the defendant chose his victim on account of the victim's race, the maximum sentence was increased to seven years under Wisconsin's penalty enhancement statute.[197] The defendant was then sentenced

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[190] *Id.* at 391–92. Then Scalia threw in one of his zingers: "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *Id.* at 392.

[191] *Id.*

[192] *Id.* at 393–94.

[193] *Id.*

[194] *Id.* at 396 ("The politicians of St. Paul are entitled to express [their] hostility—but not through a means of imposing unique limitations upon speakers who (however benightedly) disagree.").

[195] 508 U.S. 476 (1993).

[196] *Id.* at 480.

[197] *Id.* The legislative history behind hate crime statutes often demonstrates the legislature's aim is to punish bias-motivated crimes committed against minorities. *See, e.g.*, H.R. REP. NO. 105-845, at 54–57 (1998) (discussing the Hate Crimes Prevention Act of 1997 and describing hate crimes committed against homosexual men and women); H.R. REP. NO. 103-244, at 1–2 (1993) (discussing the Hate Crimes Sentencing Enhancement Act of 1993 and describing hate crimes being committed against a Chinese-American man, a Jewish Temple, a homosexual man, and an Ethiopian man). Nothing in the language of hate crime statutes, however, keeps them from being used by the government to punish members of minority groups. For example, the defendant in *Wisconsin v. Mitchell* was an African-American male. 508 U.S. at 479. *See also* Todd Spangler, *Restaurant Shooting Suspect Charged*, THE PLAIN DEALER, Mar. 3, 2000, at 14A (reporting that an African-American man was charged with ethnic intimidation after going on a shooting rampage where he allegedly purposely shot at Whites, while telling non-Whites to get out of the way); Lasson, *supra* note 31, at 76 n.183 (noting one of the students punished under the University of Michigan's speech code was a

to four years in prison.[198] The defendant challenged the sentence enhancement statute contending it was a violation of his First Amendment rights according to the Supreme Court's decision in *R.A.V.* and the Supreme Court of Wisconsin agreed.[199]

The United States Supreme Court recognized the statute did punish criminal conduct as Wisconsin had argued, but stated that the enhancement provision increased the maximum penalty based upon defendant's discriminatory viewpoint.[200] A defendant committing the same crime without this discriminatory viewpoint will be punished less severely than the person who has a racist motive. The Court observed, however, that courts have traditionally considered many factors when determining sentences, and motive is one of the most important of these factors.[201] A defendant cannot be punished for holding certain abstract beliefs regardless of how offensive these beliefs may be to the sentencing judge. The judge may not even consider these beliefs for sentencing purposes. The defendant's abstract beliefs may be considered only if these beliefs are relevant to aggravating factors traditionally considered at sentencing.[202] Thus, a judge may not punish a defendant more severely because the judge does not like the fact that the defendant is a racist. However, the judge may punish the defendant if the fact the defendant is a racist is relevant to an aggravating factor of the crime.[203]

Black law student who called another student "white trash"). Additionally, Nat Hentoff quotes from a brief submitted to the Supreme Court in the *R.A.V.* case:

> [I]f the St. Paul ordinance had been in effect in the South during the 1950s, it could have been used to prosecute a black family for putting a sign on their front lawn demanding: "Integrate all-white schools now!" That speech would certainly have "arouse[d] anger, alarm, or resentment in others on the basis of race."

HENTOFF, *supra* note 2, at 259–60.

[198] *Mitchell,* 508 U.S. at 481.

[199] Wisconsin v. Mitchell, 485 N.W.2d 807, 811 (Wis. 1992). The Wisconsin high court clearly relying upon the *R.A.V.* decision wrote: "the Wisconsin legislature cannot criminalize bigoted thought with which it disagrees." *Id.* at 815.

[200] 508 U.S. at 484–85.

[201] *Id.* at 485.

[202] *Id.* at 485–86 (discussing the difference between punishing a defendant based upon his abstract beliefs and punishments based upon aggravating factors of the crime).

[203] *Compare* Dawson v. Delaware, 503 U.S. 159 (1992), *with* Barclay v. Florida, 463 U.S. 939 (1982) (plurality opinion). In *Dawson,* the Court held that the admission of evidence pertaining to a capital defendant's membership in the Aryan Brotherhood, a racist hate group, violated the defendant's First Amendment rights of association and free speech. *Dawson,* 503 U.S. at 167. The Court found that this evidence proved nothing more than that the defendant harbored racist beliefs. In *Barclay,* four African-American men kidnapped, repeatedly stabbed, and shot a White man twice in the head for the admitted purpose of starting a "race war." *Barclay,* 463 U.S. at 942–44. The trial judge sentenced two of the defendants to death and used these defendants' racist motivations as one of the aggravating factors a judge in Florida must find before imposing a death sentence. *Id.* at 948 n.6. In affirming the trial judge's

The defendant argued that the statute punished him for his motive separate from his actual crime. The Court, however, stated that the motive in the Wisconsin statute is used in the same way as it is used in the federal anti-discrimination laws, which have been upheld against First Amendment challenges.[204] Finally, the Court differentiated the *R.A.V.* decision from this decision by stating the ordinance in *R.A.V.* was aimed at conduct protected by the First Amendment, whereas the Wisconsin statute was not.[205]

In 1995, the Supreme Court addressed what at first might seem to be a corollary issue, but, in actuality, has significant implications for those favoring campus hate speech codes. In *Rosenberger v. Rector of the University of Virginia,*[206] the Supreme Court struck down the school's policy of refusing to fund organizations promoting "a particular belie[f] in or about a deity or an ultimate reality."[207] At first glance, *Rosenberger* appears to simply involve a university attempting to maintain a firm line between church and state, however, the Court's discussion of viewpoint discrimination reaffirms the holding of *R.A.V.* and also demonstrates that *R.A.V.*'s holding applies on college campuses.[208]

In *Rosenberger,* the University of Virginia had a program for funding all student organizations, except student groups seeking funding for religious activities.[209] When several undergraduates formed a student magazine dedicated to promoting tolerance for Christian viewpoints and sought funding for the magazine from the university, the school rejected the group's request.[210] The school, after examining the first issue of the group's magazine, based its rejection on the policy prohibiting the funding of activities that promote a religious perspective.[211] After losing their campus appeal of the funding decision, the plaintiffs filed suit in federal court claiming the refusal to fund was made solely

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consideration of the defendant's racial motives in imposing the death penalty, Justice Rehnquist, writing for the plurality stated, "[t]he United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder. The judge in this case found [the defendants'] desire to start a race war relevant to several statutory aggravating factors." *Id.* at 949. Thus, in *Dawson,* the defendant's racist beliefs were irrelevant to the case and only served to inflame the jury. Whereas, in *Barclay,* the judge did not punish the defendants because of their racist beliefs, but rather, these beliefs were relevant to Florida's statutory aggravating factors.

[204] *Id.* at 487. *See generally* Hishon v. King & Spalding, 467 U.S. 69 (1984) (upholding Title VII against a First Amendment challenge by the employer).

[205] *Mitchell,* 508 U.S. at 487.

[206] 515 U.S. 819 (1995).

[207] *Id.* at 823, 837.

[208] *See supra* notes 176–94 and accompanying text.

[209] 515 U.S. at 823–25 (describing the school's procedure for funding extracurricular activities).

[210] *Id.* at 825–27 (introducing the plaintiff in Rosenberger and explaining how this organization attempted to receive funding through the university).

[211] *Id.* at 827.

upon the group's religious viewpoint, thus violating their First Amendment rights.[212]

The Court began its opinion by pointing out that although content-based restrictions on speech are strongly disfavored, viewpoint restrictions are an even more egregious infringement of First Amendment rights.[213] The university argued that the policy was a content-based restriction, but the Court found the policy to be a viewpoint restriction because the school did not exclude religion as a subject matter, but rather, denied funding only to activities with religious viewpoints.[214] That is to say that the school did not prohibit a student paper from printing an article explaining the various religions of ancient Mesopotamia. However, an article discussing birth control from a religious point of view would violate the school's policy. Of course, an article discussing birth control from a feminist perspective would be perfectly acceptable under the university's policy. This disparate treatment of similar topics led the Court to state "the University may not silence the expression of selected viewpoints."[215]

The Court also took a strong stance against viewpoint restrictions on college campuses. Calling universities "one of the vital centers for the Nation's intellectual life," the Court found that the school's regulation risked suppressing the creative power of students.[216] Since the Renaissance, universities have traditionally been places dedicated to dialogue, and viewpoint restrictions are inapposite to this long tradition.[217] If the University of Virginia's policy were allowed to stand, a great deal of the speech of such "hypothetical students" as Plato, Spinoza, Descartes, Marx, Bertrand Russell, and Sartre would have been suppressed because each included the promotion of an ultimate reality in their writings.[218] The Court's discussion of the importance of free expression on college campuses may be taken as a sign that the Supreme Court is suspicious of attempts to limit First Amendment rights on the campuses of American universities.

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212 *Id.*

213 *Id.* at 829 ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

214 *Id.* at 831.

215 *Id.* at 835. The Court stated that viewpoint restrictions pose two dangers to the First Amendment: (1) it grants the government the power to examine a publication to determine if the publication meets with the state's approval and (2) it also raises the possibility of chilling thought and expression. *Id.*

216 *Id.* at 836.

217 *Id.*

218 *Id.* at 836–37.

F. *The End of Phase I*

The decisions of these federal courts in the 1990s have effectively ended the first round of battles over the constitutionality of campus hate speech codes. The proponents of hate speech codes primarily attempted to justify speech regulations by a combination of the fighting words doctrine[219] and the University Mission Model.[220] The federal courts tested the constitutionality of hate speech code justifications by examining the codes for overbreadth, vagueness, and content/viewpoint neutrality.

Although each court that addressed the issue agreed that a school could limit fighting words, the courts also agreed that speech codes relying on the fighting words doctrine would be unconstitutionally overbroad if the regulation swept up a substantial amount of protected speech at the same time. In addition, the courts will accept the fighting words doctrine only if it is limited to speech that, by its very utterance, tends to incite an immediate breach of the peace. The vagueness doctrine also limits the applicability of the fighting words justification. If a regulation does not give notice to students that particular speech can be punished, the speech code will be deemed unconstitutionally vague.[221] A speech regulation that delegates to those enforcing the code unrestricted power to decide what speech will be punished is also unconstitutionally vague.[222]

Several courts agreed with the proponents of hate speech codes and stated that universities have an obligation to promote racial diversity and tolerance. However, these courts stated that these obligations may not be met at the expense of the First Amendment. While students do not shed their constitutional rights at the *schoolhouse* gate,[223] courts are apparently very willing to place the First Amendment in a higher position once one passes through the *university* gates. In

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219 *See supra* Part II.B.3.

220 *See supra* Part II.B.2.

221 Speech codes often run into problems when they say "offensive speech" can be punished, because offensiveness is a relative term. As Wayne Dick wrote in his letter to president Giamatti: "I have seen many posters [around campus] that I thought were worthless and offensive, but I respect others' right to express their views . . . ." Dick saw posters he found offensive go unpunished, while he was punished because others found his poster offensive. The sarcastic, but enlightening line with which Dick ended his letter to Giamatti exemplifies the problem vagueness poses to a student desiring to express controversial ideas: "If my sentence is not overturned, please advise me as to other views that I am also not allowed to criticize, so that I won't unknowingly violate my probation and the standards of Yale University." *See* Shiell, *supra* note 3, at 52.

222 This type of vagueness threatens to chill speech on campus because vague codes allow college administrators to make ad hoc determinations of what is punishable. A student has no idea whether his speech is permissible until the administration passes judgment on it after the student has already made his comments and placed his neck on the chopping block. Thus, if a student fears the chopping block, the student would be wise to keeps his ideas to himself.

223 Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 506 (1969).

order for a university to limit hate speech, the speech must substantially and materially disrupt the university's mission. The decision about whether speech substantially and materially disrupts a university's mission must be made with recognition of the important position the right to freedom of expression holds on a university campus.

Finally, courts in the 1990s announced a requirement that placed a major constitutional obstacle in front of campus hate speech codes—content/viewpoint neutrality. This obstacle will be a difficult requirement to overcome for those proponents of speech codes who justify the codes using the fighting words doctrine or those who argue that the codes should only punish hate speech directed toward minorities. These federal court decisions teach that the power to limit speech for one reason does not mean that the state has the power to prohibit the same speech on another basis. In sum, the federal courts have prohibited universities from silencing the expression of selected viewpoints for whatever reason.

It is possible that future courts will overrule decisions like *Doe v. University of Michigan* or *R.A.V. v. City of St. Paul,* but the principles of those decisions seem to be firmly rooted in First Amendment law. As each year goes by stare decisis becomes stronger and the likelihood of courts going in a different direction becomes less probable. More than likely, the proponents of campus hate speech codes will have to replace the traditional justifications for the codes with new reasons for support. The next Part will examine possible replacements for the traditional justifications for college hate speech regulations.

III. PHASE II—WHAT'S NEXT FOR WAYNE DICK

The best future strategy for proponents of hate speech codes might be to combine failed past attempts into one coherent policy. This combination theory should involve elements that provide a First Amendment justification and a constitutionally valid framework for limiting speech.[224] The combination of elements from the Supreme Court's decision in *Tinker v. Des Moines Independent School District*[225] with aspects derived from Title VII workplace discrimination law does just that. Neither *Tinker* nor Title VII by itself provides a constitutionally sufficient justification for limiting speech,[226] but by combining these two theories, proponents of speech codes would have a First Amendment justification for limiting speech and an accepted framework for doing so.

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[224] In Phase I speech codes were routinely struck down because they lacked a sufficient justification in one or both of these areas. *See, e.g., supra* notes 82, 111, 125, 127, 143, and 164 and accompanying text. Thus, any proposed justification for a hate speech code should focus on covering these two areas.

[225] 393 U.S. 503 (1969).

[226] *See infra* Parts III.A.2 and III.B.2 (explaining why neither *Tinker* nor Title VII is sufficient by itself).

A. *The* Tinker *Prong*

In Phase I of the hate speech code debate, the proponents of the codes primarily attempted to justify the codes' constitutionality on First Amendment grounds. The proponents contended hate speech codes could be limited because of the fighting words doctrine or because of the low perceived value of hate speech. Opponents of the codes primarily decided to defend their position by waving the First Amendment flag because the Court often interprets exceptions to the First Amendment quite narrowly. Thus, proponents of speech codes were fighting the battle over hate speech codes on their opponents' home turf. The proponents would have been better off fighting on friendlier grounds.

The *Tinker* prong of the combination theory provides proponents of speech codes with a constitutional justification for limiting speech that does not overstep its own authority. The Court's holding in *Tinker* allows proponents of speech codes to confront opponents of the codes with First Amendment precedent of their own, but does not require the proponents to rest their entire justification on the Court's holding.[227] Instead, it builds a solid First Amendment foundation and provides a jumping off point for the second prong of the theory.

1. *The* Tinker *Court's Holding*

It is important to appreciate the *Tinker* Court's ruling because it lays much of the framework for analyzing First Amendment issues in the public school setting. Nearly every case with issues concerning the First Amendment rights of students cites *Tinker*.[228] Although the specific facts of *Tinker* revolve around a public high school setting, the Supreme Court has applied the holding of *Tinker* to cases involving First Amendment rights of college students.[229]

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[227] In Phase I, the courts would often agree that justifications such as the fighting words doctrine would allow a university to restrict speech on campus. The problem with the universities' codes was that they relied upon the fighting words doctrine to limit speech beyond fighting words. Thus, courts were willing to accept the theory that universities could restrict speech, but were not willing to accept the breadth universities attempted to give to their First Amendment justifications. *See, e.g.*, Doe v. Univ. of Mich., 721 F. Supp. 852, 862–64 (E.D. Mich. 1989) (explaining that the school is justified in restricting fighting words, libel, slander, obscene speech, but may not limit speech outside these categories simply because the university does not approve of the speech).

[228] A Westlaw Keycite search of the *Tinker* decision on August 16, 2000, found 3,216 cites to *Tinker*.

[229] Healy v. James, 408 U.S. 169, 189 (1972) (citing *Tinker* to support the proposition that "[a]ssociational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education").

In December of 1965, a group of students decided to wear black armbands to school in order to publicize their objections to the Vietnam conflict.[230] The principals of the Des Moines public schools decided to implement a policy forcing students to remove the black armbands at school.[231] Refusing to remove the armband would result in suspension from school until the student returned without the armband.[232] On December 16, Mary Beth Tinker, a thirteen-year-old junior high student, and Christopher Eckhardt, a sixteen-year-old high school student, wore black armbands to school and were sent home for refusing to remove the armbands.[233] The next day, John Tinker, a fifteen-year-old high school student wore a black band to school and was also suspended until he returned without the armband.[234] The fathers of the students then filed suit in federal court claiming their children's First Amendment rights were violated by the school's policy.[235]

The Court began its opinion with a now famous statement. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[236] With this statement, the Court acknowledged that simply by virtue of being a student, a citizen of the United States does not lose her First Amendment rights. On the other hand, the Court acknowledged the importance of the school's interest in maintaining control and discipline.[237] These two concepts can often come into conflict. This has allowed for showdowns like the campus hate speech code debate because each side rests its argument on one or the other of these two passages.

The district court upheld the school's policy because the court found the administration's action was reasonable in light of the school's fear of a disturbance created by students wearing the black armbands.[238] The Supreme Court strenuously disagreed with the district court's holding. The Court rationalized that "[a]ny departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear."[239] The Court continued by stating that for school officials to prohibit the speech of their students the officials must show that allowing the speech would "materially and

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230 *Tinker*, 393 U.S. at 504.

231 *Id.*

232 *Id.*

233 *Id.*

234 *Id.* at 503.

235 *Id.* at 504.

236 *Id.* at 506.

237 *Id.* at 507. While the Court acknowledged the school must be able to develop policies that enable the administration to maintain order, the Court stated that all of these discretionary functions can be "perform[ed] within the limits of the Bill of Rights." *Id.* (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1942)).

238 *Id.* at 508.

239 *Id.*

substantially" interfere with school discipline or the rights of other students.[240] Since the district court found no evidence that the administration had any reason to believe "that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students," the Supreme Court reversed the lower courts.[241]

The Court concluded its opinion by reaffirming the idea that students are citizens under the Constitution, and thus their fundamental rights must be respected.[242] The Court held that students are not to be treated as receptacles for only officially approved expression, rather "[t]he classroom is peculiarly the 'marketplace of ideas.'"[243] The Court also noted that the schools are responsible for training young men and women how to differentiate between different viewpoints.[244] Finally, the Court explicitly states that the First Amendment should be circumvented only in very narrowly defined circumstances.[245] In the school setting this means that expression may be limited only on a "showing that the students' activities would materially disrupt the work and discipline of the school."[246]

2. *The Weakness of* Tinker *in the Hate Speech Code Setting*

Proponents of hate speech codes would probably lose future court battles if they relied solely upon *Tinker* to justify speech regulations on college campuses because *Tinker* provides little guidance as to what actually constitutes a "material and substantial" disruption. Although some would disagree, it would seem difficult to argue that all hate speech constitutes a material and substantial disruption to the school environment.[247] Thus, a flat ban on all hate speech

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[240] *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). The school must show that the restriction is based on more than just a desire to avoid a controversial or unpleasant topic. *Id.*

[241] *Id.*

[242] *Id.* at 511.

[243] *Id.* at 512 (quoting Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967)).

[244] *Id.* at 512. "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Id.* (quoting *Keyishian,* 385 U.S. at 603).

[245] *Id.* at 513.

[246] *Id.*

[247] An example of speech that was considered hate speech by a university, but is difficult to say materially and substantially disrupted the school environment is the statement by the student in a University of Michigan dentistry class who had charges filed against him by his teacher for saying, "he had heard that minorities had a difficult time in the class and he had heard that they were not treated fairly." Doe v. Univ. of Mich., 721 F. Supp. 852, 866 (E.D. Mich. 1989) (quoting the originally filed complaint). The comment was made during a small group discussion period, which was designed to allay the fears of students before taking

justified by the premise that all hate speech causes a material and substantial disruption to the school environment should be deemed facially unconstitutional.

Justifying codes in this manner is similar to the position proponents took in Phase I when they relied solely upon the fighting words doctrine, and of course, as already discussed, this method failed.[248] To ban all hate speech on *Tinker* grounds would mean that speech that does not cause a material and substantial disruption would be caught up with speech that does cause such disruptions. In Phase I, the courts were repeatedly unwilling to allow universities to use the fighting words doctrine to ban speech that did not technically constitute fighting words.[249] Consequently, the courts should be equally unwilling to ban speech that does not cause a material and substantial disruption to the operation of a university.

3. *What* Tinker *Brings to the* Tinker-*Title VII Theory*

In *Tinker,* the Court firmly stated that students do have First Amendment rights that are not easily circumvented by the school's administration. At the same time, the Court explicitly stated when the school may infringe on the free expression rights of students. A student may freely express her opinion, unless it materially and substantially interferes with school discipline or the rights of other students. Thus, *Tinker* brings a First Amendment justification to the *Tinker*-Title VII theory. Although, the *Tinker* prong does not attempt to define what speech can actually be restricted, it provides a constitutional basis for regulating speech that interferes with school discipline or the rights of other students.

By implementing the *Tinker*-Title VII justification for speech regulations, proponents of hate speech codes possess sound constitutional reasons to limit speech on campus. *Tinker* stands for the proposition that school officials have the authority to limit speech that materially and substantially interferes with the operation of the school. Thus, the question becomes, what speech materially and substantially disrupts school activity? In Phase I, proponents of hate speech codes would have likely said that all hate speech materially and substantially disrupts the functioning of a school. As has been previously demonstrated, courts were unwilling to agree with this proposition and consequently struck down the proponents' speech regulations.

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what was supposed to be one of the most difficult classes in the dentistry program. The students were placed in these small groups to discuss problems they anticipated would arise during the class. Thus, this student was doing exactly what he was supposed to be doing when he made the comment. It can hardly be said that this student's comment materially and substantially disrupted the classroom, yet the university still found the comment violated its ban on hate speech.

[248] *See supra* notes 123–27 and accompanying text.

[249] *See supra* notes 101, 123–27 and accompanying text.

The *Tinker* prong of the *Tinker*-Title VII theory does not contend that all hate speech materially and substantially disrupts school activities; rather, it stands for the principle that if speech materially and substantially disrupts the operation of a school, it can be restricted consistent with the Constitution. The *Tinker* prong leaves the responsibility of defining what hate speech will be restricted to the Title VII prong.

B. *The Title VII Prong*

As discussed in the preceding section, the language of the Supreme Court's decision in *Tinker* provides the proponents of hate speech codes with First Amendment ammunition justifying the existence of speech codes. Title VII, the second prong of the theory, provides proponents with a judicially accepted framework for speech regulation. Although sexual, racial, ethnic, and other forms of harassment often involve speech, even the most ardent supporters of the First Amendment do not claim that the amendment gives people the right to sexually, racially, or ethnically harass others.[250] To this extent, many have argued that the guidelines promulgated by the Equal Employment Opportunity Commission to enforce the anti-discrimination provisions of Title VII of the Civil Rights Act should be used as a model for the regulation of hate speech on college campuses.[251] By demonstrating that speech violating Title VII allows school officials to reasonably forecast a substantial and material disruption of school activities or the rights of other students, the proponents of campus hate speech codes should be able to justify a limitation on this speech.

1. *Title VII Law*

The Civil Rights Act of 1964[252] prohibits discrimination in employment based on race, religion, color, sex, or national origin.[253] The Civil Rights Act created the Equal Employment Opportunity Commission (EEOC) to enforce the

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[250] *See* SHIELL, *supra* note 3, at 97 (discussing how the ACLU, Justice Scalia, and Nat Hentoff all support the restriction of "systematic, repeated verbal harassment that substantially interferes with the target's functioning").

[251] *See, e.g.*, Ellen E. Lange, *Racist Speech on Campus: A Title VII Solution to a First Amendment Problem*, 64 S. CAL. L. REV. 105, 120 (1990) (suggesting that a speech code based on Title VII law will be able to survive constitutional scrutiny).

[252] *See* 42 U.S.C. § 2000e-2(a)(1) (1998) (restricting an employer's ability "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of" various individual characteristics, such as race or sex).

[253] *Id.; see also* SHIELL, *supra* note 3, at 99–100 (explaining section 703(a) of Title VII of the Civil Rights Act of 1964).

provisions of the Act.[254] The EEOC has promulgated guidelines on discrimination that define different forms of harassment.[255] In *Meritor Savings Bank, FSB v. Vinson,*[256] the Supreme Court "explicitly endorsed the EEOC interpretation of sexual harassment as including hostile work environments."[257]

In *Harris v. Forklift Systems, Inc.,*[258] the Supreme Court attempted to explain more clearly what constitutes a hostile environment. *Harris* involved a female manager who was constantly belittled by her company's president because she was a woman.[259] Additionally, the president of Forklift Systems made sexual advances toward Harris.[260] The combination of the insults and the sexual advances caused Harris to quit.[261] The Court concluded that not every derogatory comment made in the employment setting creates a hostile work environment and violates Title VII.[262] The Court also announced that the plaintiff does not have to

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[254] SHIELL, *supra* note 3, at 100.

[255] *See, e.g.,* EEOC Decisions, 40 Fair Empl. Prac. Cas. (BNA) 1890 (1986). The EEOC guidelines define sexual harassment as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Id.

Although the EEOC's guidelines are not binding on courts, the Supreme Court has stated that they "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1985) (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976), quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)); *see also* Fredette v. BVP Mgmt. Assoc., 112 F.3d 1503, 1505–07 (11th Cir. 1997) (citing the EEOC's interpretation of Title VII in recognizing a cause of action under that statute for same sex discrimination); DeNovellis v. Shalala, 124 F.3d 298, 311 (1st Cir. 1997) (citing the EEOC's Guidelines to help determine if plaintiff has established a valid claim for harassment).

[256] 477 U.S. 57 (1986).

[257] SHIELL, *supra* note 3, at 103.

[258] 510 U.S. 17 (1993).

[259] *Id.* at 19. The president of Forklift Systems made such comments as, "You're a woman, what do you know," "We need a man as rental manager," and "[You're] a dumb ass woman." *Id.*

[260] *Id.* at 19.

[261] *Id.*

[262] *Id.* at 21 ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.").

suffer an emotional breakdown in order to recover for a violation of Title VII.[263] The Supreme Court held that courts should employ a totality of the circumstances test when determining whether a hostile work environment has been created.[264] The Court then listed factors courts should consider when looking at the totality of the situation.[265]

Thus, in cases like *Meritor* and *Harris,* lower federal court decisions implementing Supreme Court precedents, and thousands of EEOC hearings, courts and federal agencies have upheld a framework for limiting speech because it violates Title VII and creates a hostile work environment. Additionally, the Supreme Court in *R.A.V.* carved out an exception to the First Amendment for speech violating Title VII.[266] Since courts have upheld Title VII limitations on speech, proponents of campus hate speech codes have attempted to create campus codes based on Title VII. These codes, however, have also run into considerable opposition in Phase I of the hate speech code debate.

2. *The Weakness of Title VII Law in the Hate Speech Code Setting*

Title VII, as a justification for campus hate speech codes, has already been found insufficient to support speech regulations by at least one federal court.[267] In *UWM,* the school attempted to justify the university's speech regulation by analogizing the school setting to the workplace environment protected by Title VII and therefore contended Title VII should also apply to school environments.[268] The court in *UWM* noted that although Title VII requires an

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[263] *Id.* at 22. Thus, actions violating Title VII fall somewhere between a single derogatory comment and conditions that drive an employee to an emotional breakdown.

[264] *Id.* at 23.

[265] *Id.* ("These [factors] may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.").

[266] R.A.V. v. City of St. Paul, 505 U.S. 377, 389–90 (1992) (stating that Title VII does not violate the Court's holding in *R.A.V.* that content-based speech restrictions violate the First Amendment). It has been suggested that Justice Scalia wrote the *R.A.V.* opinion as a way of attacking the promulgation of hate speech codes at universities around the country. *See* WEINSTEIN, *supra* note 25, at 63. It is ironic, therefore, that while possibly attacking college hate speech codes, Justice Scalia drafted a blueprint for speech code proponents to follow to help the regulations pass constitutional muster. *Id.* at 63–64.

[267] *See* UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163, 1177 (E.D. Wis. 1991) (listing three reasons why the court was unwilling to apply Title VII to campus hate speech codes).

[268] *See id.* at 1181; *see also* Lange, *supra* note 251, at 125–26 (offering six similarities between the workplace and the school setting: (1) both employees and students routinely encounter the same people; (2) both employee and student group compositions routinely change due to promotions, graduations, terminations, and dropouts; (3) both students and employees are involved in particular activities within a larger organization; (4) both employees

employer to correct situations of harassment, Title VII law does not apply equally to school environments.[269]

The *UWM* court stated three reasons why Title VII does not justify campus hate speech codes. First, Title VII was created to address discrimination in the employment setting and not in the educational setting.[270] Second, the court stated that Title VII law is based on principal-agent theory, which does not exist in the school setting because normally students are not agents of a school.[271] Finally, the court found that Title VII could not be used to uphold the school's speech code because Title VII is merely a statute, and therefore, "it cannot supersede the requirements of the First Amendment."[272] Thus, this federal district court analyzed the use of Title VII as a justification for a university's hate speech code, and explicitly rejected this theory.

3. *What Title VII Brings to the* Tinker-*Title VII Theory*

Title VII provides proponents of campus hate speech codes with a framework for regulating hate speech. One of the infirmities of code justifications in Phase I was that the regulations restricted speech in ways that courts found to be unconstitutional.[273] In *Harris,* the Supreme Court upheld the limitations placed upon speech by Title VII.[274] Thus, it can be inferred that if proponents of speech codes can develop a justification for implementing a Title VII-type policy on college campuses, such a policy could satisfy constitutional scrutiny.

The problem with the University of Wisconsin's use of Title VII in justifying its hate speech code was that the school attempted to analogize the workplace to the school setting.[275] The court was unwilling to accept the school's analogy. If another court accepts this analogy, however, it will do so with the knowledge that

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and students share common goals and experiences; (5) both employees and students experience a limited number of alternative work or school options; and (6) both the workplace and school setting are discrete and definable experiences).

[269] *UWM,* 774 F. Supp. at 1177.

[270] *Id.* It is worth noting, although the Wisconsin court did not, that Title IX of the Civil Rights Act specifically addresses gender discrimination in the educational setting. *See* 20 U.S.C. § 1681(a) (1991). This could be an example of the doctrine of *expressio unius* for statutory interpretation, that is, the inclusion of one thing means the exclusion of the other. Thus, Congress was aware that discrimination exists in school settings, but chose to limit the reach of the Civil Rights Act in school settings to gender discrimination.

[271] *UWM,* 774 F. Supp. at 1177.

[272] *Id.*

[273] *See, e.g., supra* notes 123–27 and accompanying text.

[274] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (explaining that there is a difference between "a mere offensive utterance" and conduct that rises to the level of creating a hostile work environment).

[275] *See supra* notes 132–35 and accompanying text.

the *UWM* precedent exists. The *Tinker*-Title VII theory does not rely upon this analogy for its validity.

C. *Bringing the Two Prongs of the Theory Together*

The *Tinker*-Title VII Theory is quite simple in practice. It says that campus speech that materially and substantially interferes with the operation of a school can be limited and uses Title VII to define what speech actually materially and substantially interferes with the operation of a school. Thus, the *Tinker* prong contributes a First Amendment justification and the Title VII prong adds a constitutionally-accepted framework for determining what speech can be limited by the campus speech code. Under this theory, each prong is responsible for its own aspect of the justification, but neither is responsible for the entire constitutional justification for a campus speech code. Unlike in Phase I, the *Tinker*-Title VII theory is not overbroad because neither prong oversteps the boundaries that the Supreme Court has defined.

The key to implementing the *Tinker*-Title VII theory is to accept the proposition that what violates the framework of Title VII also qualifies as a material and substantial disruption to a school's operations. In a 1996 federal district court case, the judge cited a 1993 survey that found eighty-five percent of girls and seventy-six percent of boys reported that they had been victims of unwanted sexual comments or touching in school.[276] The judge used this statistic to find that schools are on notice that student-on-student sexual harassment is common in schools and, thus, schools have a duty to create and implement policies for dealing with these situations.[277] Furthermore, the Supreme Court has held that a school can be held liable for allowing a hostile environment to exist on its grounds.[278] If courts are going to hold schools liable for allowing a hostile environment to exist, then it only makes sense that schools should be able to enact rules that ban conduct creating such environments.

By holding schools liable for the hostile environments that exist on their campuses, courts have implicitly held that such environments materially and substantially interfere with the operation of the school. The Office for Civil Rights has stated that harassment substantially interferes with a student's academic performance and her physical and emotional well-being.[279] Thus, if a hostile environment materially and substantially interferes with the operation of a school,

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[276] Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1426 (N.D. Cal. 1996).

[277] *Id.* at 1426.

[278] *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992) (concluding that damages can be awarded for a violation of Title IX).

[279] *See* Office for Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,034 (Mar. 13, 1997) (stating that the elimination of sexual harassment is needed to ensure a safe learning environment exists).

the school has a First Amendment justification for limiting speech creating such an environment in a school setting according to *Tinker*. Then, by using Title VII law, schools should have a constitutional framework for determining what speech creates a hostile environment.

In 1993, the EEOC proposed a comprehensive set of guidelines for defining workplace harassment, which was meant to cover harassment on the basis of race, color, religion, gender, national origin, age, or disability.[280] The EEOC defined harassment as

> verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, gender, national origin, age, or disability, or that of his/her relatives, friends, or associates, and that:
>
> (i) Has the purpose or effect of creating an intimidating, hostile, or offensive work environment;
> (ii) Has the purpose or effect of unreasonably interfering with an individual's work performance; or
> (iii) Otherwise adversely affects an individual's employment opportunities.[281]

The EEOC's guidelines also provide a non-exhaustive list of conduct which could be deemed harassing, including the making of epithets and slurs and posting written or graphic materials that denigrate on the basis of one of the protected classes.[282] Under the EEOC's guidelines, jokes and pranks that are denigrating with regard to one of the protected characteristics are sanctionable.[283]

In determining whether a violation of the guidelines has occurred,[284] courts should look to the totality of the circumstances.[285] Although a single act will

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[280] Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266, 51269 (proposed Oct. 1, 1993) [hereinafter *Proposed Harassment Guidelines*]. *See also supra* note 255 (stating that although these proposed rules are not binding on courts they should be used for guidance).

[281] *Id.*

[282] *Id.*

[283] *Id.* at 51,269 n.3; *see, e.g.*, DeNovellis v. Shalala, 124 F.3d 298, 310 (1st Cir. 1997); Snell v. Suffolk County, 782 F.2d 1094 (2nd Cir. 1986); Rochon v. FBI, 691 F. Supp. 1548 (D.D.C. 1988).

[284] It is important to note that the EEOC bases employer's liability on agency principles, which was explicitly rejected by the *UWM* court when applied to the university setting because normally students are not agents of their school. *Compare Proposed Harassment Guidelines*, 58 Fed. Reg. at 51,268 *with UWM*, 774 F. Supp. at 1177. However, the *Tinker*-Title VII test does not necessarily need to rely upon the Title VII prong for university liability. Rather, as discussed above, schools are on notice that this type of harassment occurs on their campus and courts have been willing to hold schools liable for it. *See supra* notes 276–78 and accompanying text. Thus, the *UWM* court's concern about analogizing Title VII workplace provisions to the school setting is dissipated by the *Tinker*-Title VII theory.

usually not constitute harassment, it is possible that an isolated incident can be so egregious that it will be considered a violation.[286] Additionally, the EEOC did not intend to limit violations to conduct directed at specific individuals, and therefore, an employee would have standing to bring suit even if she were not the intended target of the harassing conduct.[287] Thus, looking at the totality of the circumstances, it is possible that harassing conduct targeted at one individual could create a hostile environment for another.[288]

D. *Applying the* Tinker*-Title VII Theory to Wayne Dick's Posters*

If Wayne Dick had placed his BAD posters around the campus of a public university with a hate speech code based upon the *Tinker*-Title VII theory, what result would have occurred?[289] This is the question the final section of Part III attempts to answer.

First, the *Tinker* prong provides that the school would be justified in limiting speech that substantially and materially interferes with either the administration of the school or the rights of other students.[290] Speech that creates a hostile environment is deemed to substantially and materially interfere with the administration of the school and/or the rights of other students, and thus can be limited under the *Tinker* prong of the analysis.[291] This begs the question: Did Dick's posters create a hostile environment?

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[285] *See Proposed Harassment Guidelines,* 58 Fed. Reg. at 51,268; *see, e.g., DeNovellis,* 124 F.3d at 311 (noting that the plaintiff "correctly points out that the court must focus on the work atmosphere as a whole").

[286] *See, e.g.,* Daniels v. Essex Group, Inc., 937 F.2d 1264, 1274 n.4 (7th Cir. 1991) (performing a KKK ritual in the workplace creates a hostile environment); Vance v. S. Bell Tel. & Tel. Co., 863 F.2d 1503, 1510–11 (11th Cir. 1989) (hanging a noose from a light fixture above an employee's work station was clearly sufficient to establish a harassment violation).

[287] *See Proposed Harassment Guidelines,* 58 Fed. Reg. at 51,268.

[288] This makes a great deal of sense because at the very least one can imagine what it would be like to work in an environment where someone similarly situated is being harassed. The thought that when they finish with her, they will come to me next must come to mind. Not to mention one might find the harassment of a coworker very offensive. The problem is, of course, magnified if the harasser is a supervisor.

[289] Technically, the EEOC's proposed guidelines would not protect employees from harassment based upon sexual orientation, unless the harassment also involves conduct of a sexual nature, however nothing would stop a university from adding sexual orientation to the list of covered forms of harassment. *Proposed Harassment Guidelines,* 58 Fed. Reg. at 51,266. It will be assumed that the hypothetical university that Wayne Dick now attends protects against harassing speech based on sexual orientation.

[290] *See supra* Part III.A.3.

[291] *See supra* Part III.C.

Under the Title VII prong,[292] a person becomes a harasser if their conduct meets any one of three requirements:

1) creates an intimidating, hostile, or offensive environment
2) unreasonably interferes with an individual's work performance
3) adversely affects another's opportunities[293]

To begin, if the posters were found to violate one of the above requirements, Wayne Dick could not use the defense that he was only joking.[294] The fact that the posters targeted a group rather than a specific individual aids Dick's defense, but does not completely exonerate him.[295] Similarly, Dick is not exonerated by the fact that his posters represent a single act.[296]

Starting with the third requirement, it would seem difficult to believe that any student lost an opportunity because of Dick's posters. This requirement would most likely be used to punish speech that kept a student from participating in an activity or from receiving an award or other type of recognition. Dick's posters would probably not violate the second requirement either. To say that posters displayed in a few places around school unreasonably interferes with a student's

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[292] There is some discussion that codes based on Title VII may be unconstitutional in the wake of the Supreme Court's decision in *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992). In *R.A.V.,* the Court strongly rejected the idea that the government could differentiate speech on the basis of its viewpoint. *Id.* at 381. The decision specifically mentions that Title VII does not violate the holding of *R.A.V.* because Title VII is directed toward conduct and not speech. *Id.* at 389–90. Title VII-based speech codes, however, do target speech. Thus, at the very least, Title VII-based speech codes should be enforced equally against harassing speech by members of the majority and members of the minority. Otherwise, Title VII-based speech codes would be limiting only a particular viewpoint of harassing speech while allowing another, which is the problem the Court had in *R.A.V. See id.* at 386. ("[T]he power to proscribe particular speech on the basis of a noncontent element . . . does not entail the power to proscribe it on the basis of a content element . . . ."). *Compare* Frisby v. Schultz, 487 U.S. 474 (1988) (upholding a content-neutral ban on targeted residential picketing) *with* Carey v. Brown, 447 U.S. 455 (1980) (invalidating a ban on residential picketing that exempted labor picketing). *Frisby* and *Carey* demonstrate the distinction between the government regulating speech on a neutral basis and the government demonstrating favoritism toward certain messages.

[293] *See supra* note 281 and accompanying text.

[294] *See supra* note 283 and accompanying text.

[295] *See Proposed Harassment Guidelines,* 58 Fed. at 51,268 (providing that "employees have standing to challenge a hostile or abusive work environment even if the harassment is not targeted specifically at them"); Waltman v. Int'l Paper Co., 875 F.2d 468, 477 (5th Cir. 1989) (holding that sexual graffiti in the workplace was relevant to plaintiff's hostile work environment claim even though the graffiti was not directed specifically at her); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1522–23 (M.D. Fla. 1991) (one "category of actionable conduct is behavior that is not directed at a particular individual or group of individuals but is disproportionately more offensive or demeaning to one" group).

[296] *See supra* note 286 and accompanying text (citing cases holding that a single incident may constitute harassment).

work performance appears to stretch the requirement too far.[297] To punish Wayne Dick for his poster under this prong would lead to the punishment of any poster a group of students found offensive.[298] The key language to the second requirement is the "unreasonably interfered" clause. Simply seeing a sign posted on a campus bulletin board could not constitute such an event that a reasonable student is unable to perform his or her schoolwork.[299] Additionally, there is no evidence that any specific student suffered injury beyond finding the sign offensive.

The first requirement of the Title VII prong is perhaps the most general because many things could be considered offensive or hostile.[300] For example, although the GLAD posters probably would not have been considered hostile to

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[297] The Seventh Circuit held that a court should analyze harassment allegations by applying both a subjective and an objective standard. Daniels v. Essex Group, Inc., 937 F.2d 1264, 1271 (7th Cir. 1991). By analyzing allegations in this manner, a court will be able to give weight to the victim's injury while at the same time considering the situation against a reasonable standard. *Id.* at 1272. If the court finds the situation violates both a subjective and objective standard, the plaintiff has alleged a violation of Title VII. Neither the subjective nor the objective standard appears to have been violated by hanging these posters. The posters were displayed in a single incident, and stated the author's opinion about a controversial topic. Moreover, Dick's posters appeared without any sign of threatening behavior to follow. Thus, it appears the posters fail the objective element of the analysis. Additionally, other than the fact that the posters offended people, there is no evidence that this incident caused anyone harm. Therefore, the incident also fails the subjective element of the analysis.

[298] Remember that Wayne Dick said he had found other posters displayed on campus to be offensive. *See supra* note 20. If mere offensiveness were the sole standard, the analysis would not contain any objective element and would essentially result in giving every member of the community a "heckler's veto" over every other member's speech. *See supra* note 297 (discussing the objective element of Title VII analysis). *See also supra* note 143 (discussing the heckler's veto).

[299] For an example of what would constitute a violation of the second requirement see the facts of *Cohen v. San Bernardino Valley College,* 92 F.3d 968, 970 (9th Cir. 1996) (describing a situation that led a student to stop attending her English class after her professor refused to stop using profanity, discussing topics of a sexual nature, assigning writing projects on controversial topics, and directing humiliating comments at her and other female students).

[300] The way one views the academic setting will greatly influence her analysis of whether a situation rises to a sufficient level to establish a violation of a Title VII-based speech code. One way of analyzing the situation would be to say that it takes a higher degree of offensiveness or hostility to constitute a violation in the school setting than it would in the workplace because universities are generally more committed to the concept of open discourse than employers. *See supra* note 36. Another way of analyzing the situation would be to say that the burden is lower in the school setting because generally students are younger and require more protection than employees. The university can be pictured in a more paternalistic light than the normal employer, and thus feel an obligation to protect its students from harm. The way a school's administration chooses to view its position will greatly influence how it interprets possible violations. Both views are rationally based. I would simply suggest that if a school were to choose to follow the second view, it could avoid the hypocritical position that the University of Michigan took when drafting its code. *See supra* notes 16 and 83.

Wayne Dick, he clearly found them offensive.[301] To violate the first requirement of the Title VII prong takes more than simply doing something offensive or hostile, because one must also create an intimidating, hostile, environment.[302] To say that Dick's posters created a hostile environment would probably also stretch the requirement too far.[303] This is where the fact that the posters were not targeted at an individual and were posted in an isolated incident becomes significant. To say that Dick's posters all by themselves created a general environment of hostility probably gives Wayne Dick more credit than he deserves.

Thus, under the *Tinker*-Title VII theory Wayne Dick would not have been punished for posting the BAD signs around campus. According to the First Amendment, this is the correct result. Dick's parody was his opinion on a public event. Although he meant to be offensive and probably a little bit hostile, one could hardly say that he created an intimidating, hostile, or offensive environment. Also, it is difficult to see how his poster prevented anyone on campus from being able to do schoolwork or adversely affected anyone's chance at a particular opportunity.

IV. CONCLUSION—THE MOST IMPORTANT QUESTION OF ALL

This note has attempted to explain why Phase I of the campus hate speech code debate came to an end and in which direction proponents of such codes should move in the future. Along the way, the note suggested a possible speech code that would withstand constitutional scrutiny. This note will end by addressing the most important question in the entire debate—should we?

Undoubtedly, every college administrator in recent years has considered the question: "Should we create a hate speech code for our university?" This question leads to thousands of related issues, but these issues boil down to one—should we?

Pretending for a moment that the First Amendment does not exist, thus simplifying the problem greatly, should we create a campus hate speech code? Clearly, hate speech has the ability to injure its targets, and we should want to

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[301] What is interesting is that as I write this, I cannot imagine Wayne Dick finding the GLAD posters hostile in the least bit, but I can see the members of GLAD perceiving Dick's posters as hostile. Perhaps this is because Dick's poster can be seen as being aggressive, where GLAD's is merely an advertisement. Or maybe it is because Dick is a member of the majority and GLAD is a group of minority students. This dichotomy demonstrates what a powerful weapon satire can be because Dick probably meant to show hostility toward a group with which he vehemently disagrees.

[302] *See, e.g.*, DeNovellis v. Shalala, 124 F.3d 298, 311 (1st Cir. 1997) ("In determining whether harassment on the job is sufficiently severe or pervasive to rise to the level of a Title VII violation, courts look to the gravity as well as the frequency of the offensive conduct."); *see also* Nazaire v. Trans World Airlines, Inc., 807 F.2d 1372, 1380 (7th Cir. 1986) (finding that a small number of minor racial incidents does not rise to the level of a Title VII violation).

[303] *See supra* note 297.

protect them from this harm. Of course, we want to teach those with hateful thoughts that these ideas are not correct. Without a doubt, we want to stamp out racism, sexism, homophobia, and other forms of hateful ideologies. If these are our goals, will a campus hate speech code help us to achieve them?

Certainly, a speech code, by purifying the air around campus will protect minorities on campus from hateful speech,[304] but this will also drive the hate underground where it will be able to fester in secret. For those students who are punished under the code, do we think they will change their beliefs because of this punishment? Do we think Wayne Dick changed his opinion of homosexuality after the Yale disciplinary procedure? Speech codes have absolutely no chance of bringing people with different viewpoints together. Speech codes may demonstrate that the school strongly disapproves of hateful speech, but there are other ways that the school can accomplish this feat. The school can choose a method that empowers students,[305] rather than the paternalistic scheme of creating an artificially pure atmosphere through the creation of a campus speech code.

When the First Amendment is added back into the mix, school administrators face two problems. One, the First Amendment places restrictions on the effectiveness of any speech code implemented by the university. If the only speech codes that will pass constitutional scrutiny are ineffective at actually purifying the campus' air, speech regulations become merely a symbolic gesture of the school's disapproval of this speech.[306] Two, there is a fundamental tension created when a school dedicated to open discourse and the exchange of ideas attempts to limit the speech of its students. As Benno Schmidt, the man who succeeded A. Bartlett Giamatti as President of Yale University, stated, "we cannot censor or suppress speech in a university, no matter how obnoxious its content, without violating the principle that is our justification for existence."[307] With or without the First Amendment, in the end, each of us is left with the question—should we?

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[304] Of course, purifying the campus air may also silence voices of social change. Often, tension and controversy act as a catalyst. College campuses have traditionally been a platform where differing views can be expressed. A purified campus cannot provide such a platform. For example, a purified campus would, at the very least stifle, and at most prosecute a young Malcolm X.

[305] *See supra* note 60 (describing the approach taken at Arizona State University).

[306] It could be argued this is a good enough reason, but the problem is that it creates First Amendment martyrs like Wayne Dick. Dick's story received national attention not because of the offensive nature of his posters, but because the school tried to punish him for posting them. Some people will overlook the fact that the posters were offensive and simply focus on the school's attempt to punish the student. At Arizona State, the school was able to condemn the offensive speech and get the rest of campus to do so as well (including the students who hung the offensive sign in the first place) without ever actually disciplining anyone. *See supra* note 60.

[307] HENTOFF, *supra* note 2, at 132.